Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY, LOCAL 38,

Petitioner,

v.

HUBER, HUNT & NICHOLS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the parties to a project labor agreement gave the arbitrator the authority to determine whether he can resolve disputes over arbitrability or whether that issue is properly left for judicial determination.

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Petitioner United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 38 ("Local 38") petitions for the issuance of a Writ of Certiorari to review the Opinion of the United States Court of Appeals for the Ninth Circuit in this proceeding.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 282 F.3d 746 (9th Cir. 2002) and is reproduced in Appendix A, *infra*. The District Court's unpublished Judgment and Order Regarding Plaintiff's Motion and Defendant's Cross-Motion for Summary Judgment is available at 2000 U.S. Dist. LEXIS 15238 and 142 Lab. Cas. (CCH) ¶10,835 and is reproduced in Appendix B, *infra*.

JURISDICTIONAL STATEMENT

On March 6, 2002, the United States Court of Appeals for the Ninth Circuit filed an Opinion in this case on appeal from a Judgment and Order regarding Plaintiff's Motion and Defendant's Cross-Motion for Summary Judgment both entered in the civil docket by the United States District Court for the Northern District of California on October 12, 2000. The Supreme Court of the United States has jurisdiction to review the opinion of the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The relevant statutory provisions are Sections 8(e) and (f) of the National Labor Relations Act ("NLRA") (29 U.S.C. §§ 158(e), (f)). These provisions read as follows:

8(e). **Enforceability of contract or agreement to boycott any other employer; exception.** It shall be an unfair labor parctice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber,

manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

8(f). **Agreement covering employees in the building and construction industry.** It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the

> agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area; *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

STATEMENT OF THE CASE

A. The Underlying Facts

This case arises out of construction of Pacific Bell Park, a baseball stadium in San Francisco, California ("the Ball Park"). Plaintiff Huber, Hunt & Nichols, Inc. ("Huber") was the general contractor responsible for construction of the Ball Park. Local 38 is a labor union representing the plumbers and pipefitters who performed work for Huber and its subcontractors at the Ball Park.

Work performed by Local 38 plumbers and pipefitters at the Ball Park was subject to two separate labor agreements:

a "Project Stabilization Agreement" ("the PSA") and the U.A. Local 38 Collective Bargaining Agreement with the Northern California Mechanical Contractors Association/Master Plumbers Association of San Francisco, Inc./Independent Contractors ("the CBA"). The PSA bound Huber, its subcontractors and a number of labor unions, including Local 38, to certain conditions during the term of the Ball Park project. See Lodging Exhibit 1. The PSA is a permissible pre-hire agreement under Sections 8(e) and (f) of the NLRA, 29 U.S.C. §§ 158(e), (f). *See Building & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218 (1993) (*aka* "*Boston Harbor*"). The PSA serves a variety of general functions: it (1) serves as an umbrella agreement for purposes of maintaining "a spirit of harmony, labor-management peace, and stability" during construction of the Ballpark (§ 1.2); (2) provides for labor-management meetings on a regular basis; (3) bars the use, possession, transportation or sale of drugs and alcohol at the work site; (4) provides for binding arbitration of disputes, other than jurisdictional disputes, arising under the PSA; (5) provides a means of resolving jurisdictional disputes between signatory local unions via referral to their international unions; and (6) provides for Huber's adoption of each participating local union's individual collective-bargaining agreement. See Lodging Exhibit 1.

Section 2.4 of the PSA provides that Huber and all of its subcontractors shall be bound by the PSA and the terms of the appropriate collective-bargaining agreement of the union which has jurisdiction over the work at issue. Lodging Exhibit 1, p. 1-6. Disputes arising under the PSA were to be resolved pursuant to procedures set forth in Articles 4, 5 and 6. Disputes arising under an individual collective-bargaining agreement were to be resolved pursuant to the collective-

bargaining agreement's procedures. Lodging Exhibit 1, §§ 6.4, 6.5. In the event of a conflict between any union's individual collective-bargaining agreement and the PSA, the PSA controls. Lodging Exhibit 1, § 2.2.

Article I, § 3(b) of the CBA prohibits Huber from subcontracting work covered by the CBA to non-signatory contractors. Lodging Exhibit 2, p. L-34. Article II, § 12 of the CBA provides for exclusive hiring of Local 38 members. *Id.* at p. L-40. In addition, Section 3.1 of the PSA provides that Huber and its subcontractors will abide by the hiring and union security provisions of each local union's collective-bargaining agreement. Lodging Exhibit 1, p. L-7.

B. The Grievances

On January 18, 2000,[1] Local 38 filed a grievance under the CBA alleging that Huber awarded work to a subcontractor who was not subject to the CBA and in so doing violated the CBA's provisions regarding subcontracting and exclusive hiring. See Lodging Exhibit 3.[2] Pursuant to the CBA, the grievance was scheduled for hearing on February 3 before a joint labor-management arbitration committee (the "Arbitration Committee") to resolve the dispute. *Id.* Huber asked for and received a continuance of the hearing until February 17. See Lodging Exhibit 8, p. L-132.

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1. All dates herein are 2000 unless otherwise indicated.

2. The grievance also alleged that Huber violated the CBA by permitting subcontractors to use materials fabricated offsite. The district court vacated the portion of the Arbitration Committee's award finding that Huber had violated the offsite restrictions contained in the CBA. See Appendix B. That portion of the district court's judgement was not subsequently appealed and is no longer at issue in this case.

Immediately after receiving the continuance from the CBA's Arbitration Committee, Huber requested expedited arbitration under the PSA's grievance procedure, specifically asking the permanent arbitrator named in the PSA (the "PSA Arbitrator") to convene a hearing *in advance of* the hearing scheduled on Local 38's grievance before the Arbitration Committee. Huber's letter to the PSA Arbitrator asserts that Local 38's grievance amounts to a "jurisdictional dispute" between Local 38 and other unions signatory to the PSA and, therefore, must be resolved pursuant to the PSA. See Lodging Exhibit 4. The PSA Arbitrator granted Huber's request and scheduled a hearing for February 15. In response, Local 38 Business Manager Larry Mazzola sent the PSA Arbitrator a letter dated February 14 noting that the grievance at issue was scheduled for hearing before the Arbitration Committee and that the hearing had been continued to February 17 at Huber's request. See Lodging Exhibit 5. Mazzola's letter also explained in detail that the union's grievance charged Huber with violating provisions of the CBA and that Huber's effort to characterize the grievance as a "jurisdictional dispute" was a thinly veiled attempt to circumvent the CBA and move the grievance out from under the CBA's grievance procedure. *Id.*

The PSA arbitration nevertheless went forward on February 15. Local 38 did not participate. The PSA Arbitrator issued his award the next day finding that Local 38's grievance was a jurisdictional claim requiring resolution pursuant to the PSA. See Lodging Exhibit 6.[3]

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3. The PSA Arbitrator did not decide the merits of the dispute because the PSA provides for resolution of jurisdictional disputes between signatory local unions by their international unions. See Lodging Exhibit 1, § 5.2.

The hearing before the Arbitration Committee went forward as well. Huber's attorney *made a "special* appearance" before the Arbitration Committee claiming that Local 38's grievance was properly decided by the PSA Arbitrator and that the Committee did not have jurisdiction to hear the grievance. The Arbitration Committee found that: (1) it had jurisdiction because the grievance did not raise a jurisdictional dispute but rather alleged a violation of the subcontracting and hiring provisions of the CBA; (2) Huber violated the exclusive hiring and subcontracting provisions of the CBA; (3) Huber was responsible for violations of the CBA by its subcontractors; and (4) Local 38's members lost $110,547.80 in wages and fringe benefits as a result of Huber's violations. See Lodging Exhibit 8. The Arbitration Committee ordered Huber to pay this amount to the U.A. Local 38 Trust Funds. *Id.*

C. The Decision of the District Court

Armed with a favorable arbitration award from different arbitration tribunals, Huber and Local 38 filed suit to have their favorable awards confirmed and the other party's award vacated pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. Faced with two overlapping and conflicting arbitration awards, the district court ruled that the critical question was whether the underlying dispute was jurisdictional, irrespective of the merits. If it was jurisdictional, the parties were obliged to employ the dispute resolution procedures of the PSA and the Local 38 award must be vacated. If it was not jurisdictional, then the parties were required to proceed as dictated by the CBA and the PSA Arbitrator's award must be vacated. App. B, p. 30a.

Huber argued that the PSA arbitrator and not the court had the authority to label the dispute jurisdictional or contractual, but the district court disagreed. *Id.* at 37a-38a. Relying on *AT&T Technologies v. Communication Workers*, 475 U.S. 643 (1986), the district court held that,

> Because the parties did not "clearly and unmistakably" provide that whether a grievance was jurisdictional in the first place should be determined by the PSA arbitrator, this Court – and not the PSA arbitrator – must determine whether the defendant's grievance was jurisdictional.

Id. at 38a. Turning to the PSA, the district court noted that while the PSA designates how jurisdictional disputes will be resolved, it "does not provide that the PSA arbitrator shall also decide the threshold question of whether a grievance raises a jurisdictional dispute in the first instance." *Id.* On this basis, the district court concluded that the PSA Arbitrator did not have the authority to decide whether Local 38's grievance was jurisdictional and that his award must be vacated. *Id.*

The district court then turned to the record to determine whether the underlying dispute was jurisdictional. Because Local 38 did not seek to perform the work at issue or have it reassigned but rather sought contractual damages against Huber for violation of the CBA's subcontracting clause, the court concluded that Local 38's grievance "did not raise a jurisdictional dispute" and that "the parties should have used the CBA arbitration procedures." *Id.* It thus confirmed the Arbitration Committee's award.[4]

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4. The district court enforced the PSA Arbitrator's second award regarding off-site fabrication of materials and vacated the Arbitration (Cont'd)

While the Ninth Circuit faults the district court for "determining the merits of [the] grievance under the guise of deciding questions of arbitrability," the district court did not evaluate or attempt to decide the merits of the underlying dispute in any way: the district court did not consider whether the subcontracting and hiring provisions of the CBA had in fact been violated or which union was entitled to perform the construction work at issue. App. A, p. 11a. To decide the arbitrability question before it, the district court had to review the facts underlying the dispute. The Ninth Circuit's criticism is unwarranted because the district court did exactly what was required to resolve the dispute submitted to it.

D. The Decision of the Ninth Circuit Court of Appeals

After the district court rendered its opinion, Huber filed a timely appeal. Concluding that the determination of which award should be confirmed or vacated depended on which arbitrator had the authority to arbitrate the dispute, the Ninth Circuit first addressed who had the authority to make "the threshold determination of whether or not a dispute is jurisdictional:"

> The underlying dispute here is the work assignment dispute. Whether the [PSA] Arbitrator has the power to decide the work assignment dispute turns on the nature of that dispute. Before we reach the question of the [PSA] Arbitrator's power to arbitrate the work assignment dispute,

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(Cont'd)
Committee's award with respect to the pre-fabrication dispute. This portion of the district court's decision was not appealed, and the court of appeals did not consider this issue.

> *we must first decide whether he has the power to decide the arbitrability question himself.* [Emphasis added.]

App. A, p. 6a-7a.

The Ninth Circuit concluded that the district court's "arbitrability inquiry contains a fundamental fallacy," – that the court "not the arbitrator, should decide whether or not the work assignment dispute is a 'jurisdictional dispute.'" *Id.* at 7a. The Ninth Circuit did not identify any provision of the PSA granting the PSA Arbitrator authority to decide arbitrability but based its decision to reverse the district court on context, implication, logic and "the purposes of the PSA:"

- "[O]nly the Permanent Arbitrator had power to arbitrate. The text, structure and context of the Project Stabilization Agreement assign to him the threshold determination whether or not a dispute is jurisdictional."

Id. at 6a.

- "[W]hen the Project Stabilization Agreement consigns all questions concerning the application or interpretation of the Agreement 'excluding jurisdictional disputes' to the Permanent Arbitrator, it is *implicitly* assigning to him the threshold determination whether a dispute is jurisdictional." [Emphasis added.]

Id. at 8a.

- "Logic suggests that where, as here, one party seeks to have the Permanent Arbitrator determine whether a certain dispute is

> jurisdictional and the other seeks to have an arbitrator under a local collective bargaining agreement make the same determination, the Permanent Arbitrator under the Project Stabilization Agreement should have the power to resolve the conflict."

Id. at 9a.

- The purpose of the PSA "is fostered by allowing the Permanent Arbitrator to assign disputes among the Project Stabilization Agreement's various dispute resolution procedures."

Id. at 10a.

Finding that the PSA Arbitrator had the power to arbitrate the dispute, the court deferred to his award and reversed the district court's order affirming the award under the CBA. The court of appeals reasoned that because "the Local Committee could not plausibly conclude that it had the power to contradict *the Permanent Arbitrator's arbitrability determination*," [emphasis added] public policy required that the Arbitration Committee's award be vacated. *Id.* at 15a.

REASONS FOR GRANTING THE WRIT

I. Introduction — Analysis of the Issue Presented.

The origin of the underlying dispute in this case lies in the decision by Huber to contract work to a subcontractor that did not have a collective-bargaining agreement with Local 38. Local 38 considered Huber's decision to be a violation of its agreement with Huber to contract on-site construction work covered by the CBA to subcontractors

having agreements with Local 38. Therefore, Local 38 grieved Huber's subcontracting assignment and submitted the dispute for a final and binding determination pursuant to the procedures contained in the CBA. In its grievance, Local 38 did not demand that the work be reassigned. Instead, the union simply sought compensation for its members who had been deprived of the contractual compensation they would have received had the perceived violation not occurred.

Huber, on the other hand, believed that Local 38's position created a jurisdictional dispute to be resolved under the terms of the PSA. For this reason, Huber applied to the PSA Arbitrator for a decision. The upshot was the issuance of conflicting determinations, one generated under the CBA regarding violations of subcontracting arrangements, and the other under the PSA regarding jurisdictional disputes.

The threshold question for determination upon the cross-motions for summary judgment addressed by the courts below was which of the differing dispute resolution procedures should be followed under the intertwined provisions of the two agreements to obtain a final resolution of the matter.

The district court, citing this Court's decision in *AT&T Technologies v. Communications Workers*, 475 U.S. 643, 649 (1986) ("Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator"), concluded that it was required to make that initial determination regarding arbitrability. App. B, p. 38a. The Ninth Circuit ruled that the PSA Arbitrator had that authority. App. A, p. 12a. The relevant provision of the PSA assigns in conventional language disputes "concerning any application or interpretation of the [PSA]" to the PSA

Arbitrator, with the exception of jurisdictional disputes, which ultimately are to be resolved by the International Unions of the affected local unions. Lodging Exhibit 1, §§ 6.5, 5.2. Accordingly, the question presented is whether the parties to the PSA "clearly and unmistakably" granted the PSA Arbitrator the authority to determine the arbitrability of the underlying dispute, or whether that issue is properly left to judicial determination.

We show below that the Ninth Circuit Court of Appeals has departed from the established rulings of this Court in sustaining the arbitrator's power to determine arbitrability and that the decision under review conflicts with the decisions of other courts of appeals in comparable cases. We also show that the question presented is of substantial importance in labor relations, particularly in the construction industry.

II. The Ninth Circuit Court of Appeals Departed from the Established Rulings of this Court in Holding that the PSA Arbitrator Had the Authority to Determine the Question of Arbitrability.

This Court has long held that in constructing the system of industrial self-government embodied in the National Labor Relations Act, as amended by the Labor Management Relations Act, Congress assigned to the courts the determination of whether a dispute is arbitrable. *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960); *see also John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546-547 (1964) ("Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties.") While parties may assign an arbitrator the authority to determine

questions of arbitrability, the party making that assertion bears "the burden of a clear demonstration of that purpose." *Warrior & Gulf Navigation Co.*, 363 U.S. at 583, n.7.

In *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643 (1986), this Court most recently stated the rules governing a court's determination of arbitrability under a collective-bargaining agreement. There a union grieved the employer's decision to lay-off certain employees and sought to arbitrate the dispute, but the employer refused. The contract's arbitration clause provided that "differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder" must be referred to a mutually agreeable arbitrator for resolution except those disputes "excluded from arbitration by other provisions of this contract." *Id.* at 644-645. Elsewhere the contract provided that the employer was free to exercise certain management functions, including termination of employment, "subject to the limitations contained in the provisions of this contract, but otherwise not subject to the provisions of the arbitration clause." *Id.* at 645.

Ruling on cross-motions for summary judgment, the district court held that because the union's interpretation that the contract allowed arbitration of lay-offs was at least arguable, the arbitrator, rather than the court, should determine whether the union's interpretation had merit and ordered the employer to arbitrate. *Id.* at 646-647.

On appeal the Seventh Circuit Court of Appeals affirmed what it construed as an order assigning to an arbitrator the threshold question of arbitrability. While acknowledging that arbitrability is a question for the courts to decide unless the parties stipulate otherwise, the court announced an "exception" under which

> [A] court should compel arbitration of the arbitrability issue where the collective bargaining agreement contains a standard arbitration clause, the parties have not clearly excluded the arbitrability issue from arbitration, and deciding the issue would entangle the court in interpretation of substantive provisions of the collective bargaining agreement and thereby involve consideration of the merits of the dispute.

Id. at 647, quoting *Communications Workers v. Western Electric Co.*, 751 F.2d 203, 206 (7th Cir. 1984).

This Court ultimately vacated the Seventh Circuit's decision and remanded the case for a determination of whether the employer was required to arbitrate the union's grievance. 475 U.S. at 648. In so holding, the Court repeated four principles gleaned from the *Steelworkers Trilogy*: *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, *supra*; and *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

The first principle is that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. [Citations to *Warrior & Gulf* and *American Mfg. Co.*]" 475 U.S. at 648-649. The second principle is that

> [T]he question of arbitrability – whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance – is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably

> provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator. [Citations omitted.]

Id. at 649.

The next principle derived from the Court's prior cases is that, "in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." *Id.* The final principal is that

> [W]here the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that "[an] order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. [Citations omitted.]"

Id. at 650. The Court further stated that the last rule is particularly applicable where the contract contains a broad arbitration clause, such as one providing that "any differences arising with respect to the interpretation of [the] contract or the performance of any obligation" shall be arbitrated. *Id.*

Relying on these principles, the Court found that the Seventh Circuit Court of Appeals erred in ordering the parties to arbitrate the arbitrability question. *Id.* at 651. The Court stated,

> It is the court's duty to interpret the agreement and to determine whether the parties intended to

> arbitrate grievances concerning layoffs predicated on a "lack of work" determination by the Company. If the court determines that the agreement so provides, then it is for the arbitrator to determine the relative merits of the parties' substantive interpretations of the agreement. It was for the court, not the arbitrator, to decide in the first instance whether the dispute was to be resolved through arbitration.

Id.

In the present case, the Ninth Circuit Court of Appeals has clearly misapplied the principles contained in *AT&T Technologies* and the *Steelworkers Trilogy*. Like the Seventh Circuit in *AT&T Technologies*, the Ninth Circuit in this case decided that the parties granted an arbitrator the authority to decide the character of a dispute, and in doing so decide arbitrability, by the inclusion of a broad arbitration clause in the contract. See App. A, p. 6a ("Arbitrability is generally a question for the court, rather than the arbitrator, except where a broad arbitration clause is susceptible to more than one interpretation on the question of arbitrability.")[5] By ceding this authority to the PSA Arbitrator, the Ninth Circuit ignored the second *AT&T Technologies* precept that it takes nothing less than a clear and unmistakable grant by the parties to transfer arbitrability questions from the court to an arbitrator.

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5. Prior Ninth Circuit decisions in this area make clear that the Ninth Circuit does not comport with *AT&T Technologies*. *See, e.g.*, *Carpenters v. Desert Palace*, 94 F.3d 1308, 1310 (9th Cir. 1997) ("[U]nder this circuit's precedents, allowing the arbitrator to decide arbitrability where a broad arbitration clause exists is 'an act of legitimate contract interpretation,'" citing *Frederick Meiswinkel, Inc. v. Laborers*, 744 F.2d 1374, 1377 (9th Cir. 1984)).

Further, the Ninth Circuit misapplied the fourth *AT&T Technologies* precept by concluding that a broad arbitration clause acts to shift authority over arbitrability questions from the court to an arbitrator, rather than serving only as a factor for the court to consider in deciding arbitrability.

The "broad arbitration clause" in this case does not grant the PSA Arbitrator any more authority than the "standard arbitration clause" considered by the Court in *AT&T Technologies*. The language in the PSA that the PSA Arbitrator had authority to resolve "[a]ny dispute, excluding jurisdictional disputes . . . or No Strike - No Lockout disputes . . . , concerning any application or interpretation" of the PSA is no broader than the *AT&T Technologies* arbitration clause which granted an arbitrator authority to resolve "differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder" except disputes "excluded from arbitration by other provisions of this contract." Lodging, Exhibit 1, § 6.5; 475 U.S. 644-645. Because the two arbitration clauses are not meaningfully different, the Ninth Circuit was obligated by precedent to reach the same conclusion as the *AT&T Technologies* Court: arbitrability is for the court, rather than an arbitrator, to decide.

Further, it is undisputed that no provision of the PSA expressly provides that the PSA Arbitrator has the authority to determine arbitrability, his own jurisdiction, to characterize the nature of a dispute, or to route grievances arising under the PSA and the collective-bargaining agreements which the PSA incorporates. To the contrary, Section 6.4 of the PSA provides that any dispute, except jurisdictional disputes, concerning any application or interpretation of a local collective bargaining agreement shall be subject to the

grievance procedure contained in the local collective bargaining agreement. Section 6.5 of the PSA provides that any dispute, excluding jurisdictional and no-strike-no-lockout disputes, concerning application or interpretation of the PSA shall be subject to the PSA arbitration procedures. Lodging Exhibit 1.

The grievance lodged by Local 38 clearly arose under the CBA because it alleged only violations of specific CBA provisions. Under the plain meaning of Sections 6.4 and 6.5 of the PSA, the Arbitration Committee had the authority to resolve Local 38's grievance and the PSA Arbitrator had no authority to resolve the grievance. Huber's recharacterization of Local 38's subcontracting grievance as a jurisdictional dispute did not create any more authority under the terms of the PSA for the PSA Arbitrator to consider the dispute. Under *AT&T Technologies*, it was the district court's responsibility to examine the underlying facts and make a determination regarding the character of the dispute. The district court made exactly this determination. Because the Ninth Circuit ignored and misapplied this Court's precepts regarding arbitrability in overruling the district court's decision, the Ninth Circuit's decision cannot stand.

III. The Ninth Circuit's Decision Conflicts with the Decisions of Other Courts of Appeals in Comparable Cases.

In a series of cases, the Ninth Circuit has held that parties to a collective-bargaining agreement may grant an arbitrator, rather than the courts, the authority to decide arbitrability questions by the mere inclusion of a broad arbitration clause in the agreement. *Carpenters v. Desert Palace, Inc.*, 94 F.3d 1308 (9th Cir. 1997); *Southern Cal. Dist. Council of Laborers*

v. Berry Constr., Inc., 984 F.2d 340 (9th Cir. 1993); *New England Mechanical, Inc. v. Laborers*, 909 F.2d 1339 (9th Cir. 1990); *Teamsters Local 70 v. Interstate Distributor Co.*, 832 F.2d 507 (9th Cir. 1987). As it did in the present case, the Ninth Circuit has also held that it is the right of an arbitrator in the first instance to determine whether a dispute is a "jurisdictional dispute," and therefore whether the dispute is arbitrable, even where the contract expressly excludes "jurisdictional disputes" from arbitration. *Berry*, *supra*; *New England Mechanical*, *supra*; *Frederick Meiswinkel, Inc. v. Laborers*, 744 F.2d 1374 (1984), *cert. denied*, 470 U.S. 1028 (1985).

The Ninth Circuit's approach to arbitrability is in direct conflict with that of other circuit courts of appeals which have considered similar facts. In a series of post-*AT&T Technologies* cases, the Seventh Circuit has held that where the parties disagree whether a dispute is a jurisdictional dispute expressly excluded from the contract's arbitration provisions, the court itself must decide the character of the dispute. *Hutter Constr. Co. v. Operating Engineers*, 862 F.2d 641 (7th Cir.1988); *Operating Engineers v. Indiana Constr. Corp.*, 13 F.3d 253 (7th Cir. 1994); *Miron Constr. Co., Inc. v. Operating Engineers*, 44 F.3d 558 (7th Cir. 1995).

In *Hutter*, *supra*, the state of Wisconsin awarded Hutter, a general contractor, the contract to build a medium security prison. Hutter was a party to a collective-bargaining agreement with the Operating Engineers which gave the Operators exclusive right to operate forklift trucks through most of Wisconsin and required Hutter to subcontract bargaining unit work only to subcontractors who were parties to the agreement. The Operators' agreement generally

provided for bipartite arbitration of disputes arising under the agreement but mandated tri-partite arbitration of "jurisdictional disputes." 862 F.2d at 642.

Shortly after receiving the prison contract, Hutter contracted forklift work to a subcontractor which had a collective-bargaining agreement with the Laborers rather than the Operators. The Operators filed a grievance under its agreement claiming Hutter violated the Operators' exclusive forklift rights by subcontracting. The grievance was submitted to bi-partite arbitration. The arbitrator decided that the dispute was not jurisdictional and awarded the Operators damages. *Id.* at 642-643.

Hutter responded to the adverse arbitration award by asking the subcontractor to replace members of the Laborers with members of the Operators on the disputed work. In order to prevent the subcontractor from removing its members, the Laborers threatened the subcontractor with legal and economic action. The subcontractor filed an unfair labor practice charge with the National Labor Relations Board ("NLRB") alleging that the Laborers had threatened it with coercive action if it reassigned the work to the Operators. In the ensuing proceeding held pursuant to 29 U.S.C. § 160(k), the NLRB awarded the disputed work to the Laborers. Subsequent to the NLRB's award, the district court granted summary judgment in favor of the Operators on its claim to enforce the arbitration award and denied Hutter's motion to vacate. *Id.* at 643.

On appeal, Hutter argued that the district court erred in affirming the arbitrator's decision that the Operators' grievance was not a jurisdictional dispute. While stating that an arbitrator's award is generally accorded substantial

deference, the Seventh Circuit refused to do so with respect to the arbitrator's determination of the character of the dispute because

> Determining the character of the Operators' claim, however, necessarily determines the arbitrability of the dispute, and is, therefore, undeniably an issue for judicial determination. [citation to *AT&T Technologies*, 475 U.S. at 649] Thus, in reaching our decision, we must independently evaluate all the evidence, and give no deference to the arbitrator's findings.

862 F.2d at 644. After independently evaluating the facts, the Seventh Circuit concluded that

> [T]he Operators' subcontracting grievance was a distinct non-jurisdictional claim separable from the jurisdictional issue decided by the NLRB. In doing so, we also find that the subcontracting grievance was properly resolved through bi-partite arbitration.

Id. The Seventh Circuit so held in part because

> [C]haracterizing the Operators' subcontracting grievance as a jurisdictional dispute would produce an unfair result under the terms of the Area II Agreement. The Area II Agreement clearly contemplates the award of backpay to remedy the breach of the subcontracting provision. In contrast, the Agreement essentially precludes the award of backpay in jurisdictional disputes. In this case, Hutter clearly breached the subcontracting provision, yet, by characterizing

> the dispute as jurisdictional, would succeed in avoiding the agreed upon penalty for its conduct. We refuse to ratify this unjust result. The Operators are entitled to the benefit of their collective bargaining agreement.

Id. at 644-645.

The Seventh Circuit followed *Hutter* in *Miron*, *supra*, a case involving facts very similar to those in *Hutter*. However, in *Miron*, the general contractor had bound itself to collective-bargaining agreements with both the Operating Engineers and the Laborers. Each agreement provided that mason-tending forklifts would be the work of the signatory union. 44 F.3d at 560-561. The Operating Engineers' collective-bargaining agreement contained a broad arbitration clause which provided that "[a]ll grievances, disputes or complaints of violations of any provisions of this Agreement shall be submitted to final and binding arbitration . . ." *Id.* at 560, n.4. Unlike the arbitration clause in *Hutter*, this arbitration clause did not contain an exclusion for jurisdictional disputes. *Id.* at 560. Nevertheless, the *Miron* court, relying on *AT&T Technologies*, concluded that it was still the duty of the court to independently determine whether the general contractor was subject to bipartite arbitration under the Operators' agreement or tripartite arbitration which would include the Laborers. *Id.* at 562.

Similarly, in *Operating Engineers v. J.S. Alberici Constr. Co.*, 936 F.2d 390 (8th Cir. 1991), the Eighth Circuit Court of Appeals examined the underlying facts to determine whether a dispute was an arbitrable subcontracting dispute or a jurisdictional dispute expressly excluded from arbitration. *Alberici* involved a dispute between the Operators

and a general contractor over the contractor's decision to subcontract to a subcontractor who was not a party to the Operators' collective-bargaining agreement and instead employed members of the Painters' union to operate air compressors. The Operators ultimately sued general contractor Alberici to compel arbitration under the Operators' agreement. *Id.* The Operators' agreement contained a broad arbitration clause requiring arbitration for all "grievances, disputes or claims" arising with respect to "the enforcement or interpretation of any of the terms of" the agreement but expressly excluding "jurisdictional disputes," which were to be resolved by the AFL-CIO National Joint Board for the Settlement of Jurisdictional Disputes. *Id.* at 391.

Rather than referring the question of whether the grievance was a jurisdictional dispute or a subcontracting dispute to an arbitrator, the Eighth Circuit reviewed the facts and decided itself in which forum the dispute should be resolved. *Id.* at 391-392. While the *Alberici* court did not cite *AT&T Technologies*, its decision implicitly recognized that when the parties disagree whether a grievance is a jurisdictional dispute or a subcontracting dispute, the court, rather than an arbitrator, must decide arbitrability.

While the remaining circuit courts have not addressed whether the court or an arbitrator should decide arbitrability when a grievance can be alternately characterized as an arbitrable subcontracting dispute or a non-arbitrable jurisdictional dispute, no circuit court other than the Ninth has held that the presence of a broad arbitration clause in a labor agreement by itself entitles the arbitrator to determine his own jurisdiction. Because there is a clear split between the circuits courts which have considered these issues and

because the Ninth Circuit's disposition of arbitrability questions is clearly wrong, this Court should grant this Petition for Writ of Certiorari to resolve this matter.

IV. The Petition Presents A Question of National Importance.

The Ninth Circuit's decision begs the Court's review because of the tremendous effect it will have on national labor policy, especially in the construction industry. Simply put, the Ninth Circuit's decision destabilizes the balance between arbitrability and review of arbitration awards.

The goal of private dispute resolution through arbitration is achieved by judicial participation on issues of arbitrability and restraint in the review of arbitration awards. Through judicial determination of issues of arbitrability courts insure that only those disputes that the parties agreed to arbitrate are submitted to final and binding arbitration. As the Court stated more than forty years ago, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Warrior & Gulf Navigation Co.*, 363 U.S. at 582. A dispute concerning whether the parties have agreed to arbitrate a matter is for the court, rather than an arbitrator, to decide because the "willingness of parties to enter into agreements that provide for arbitration of specified disputes would be 'drastically reduced' . . . if a labor arbitrator had the 'power to determine his own jurisdiction. . . .'" *AT&T Technologies*, 475 U.S. at 651 (citing and quoting Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1509 (1959)). While parties may grant an arbitrator domain over arbitrability as well as the merits of a dispute, they must do so "clearly and unmistakably." *Warrior & Gulf Navigation*

Co., 363 U.S. at 582; *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964); *AT&T Technologies*, 475 U.S. at 649. Thus, judicial participation insures, at the outset, that only those matters the parties have actually agreed to arbitrate are referred to arbitration.

By deferring to arbitration awards, on the other hand, courts provide finality to that agreed-upon procedure. Courts employ an extremely narrow scope of review to the merits of an arbitrator's decision in a labor dispute. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36-37 (1987). "It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns the construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960). The deference due an arbitrator's award was re-emphasized in *Misco*: "As long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." 484 U.S. at 38.

These interdependent doctrines together have the desired result of encouraging parties to submit particular disputes to informal, extra-judicial resolution. By providing an avenue for judicial determination regarding arbitrability, the parties are assured that only disputes they agreed to submit to arbitration are arbitrated. By affording arbitration awards substantial deference, the parties are assured that the extra-judicial resolution they have chosen is respected. It is the balance of these equally stalwart rules that effectuates resolution of labor disputes by arbitration.

By removing the court from the arbitrability determination, the Ninth Circuit upsets this balance. Indeed, by deferring to arbitrators both on arbitrability *and* on the merits of the dispute, the lower court inaugurates a change in policy that portends the decreased willingness of parties to enter into labor contracts as the Court noted in *AT&T Technologies*. If such a change is to be ushered in by any court, it should be this one.

The need for the Court's voice is particularly strong where, as here, the dispute involves the intersection of dispute resolution procedures under a project labor agreement and a local collective-bargaining agreement in the construction industry. Project labor agreements, specifically authorized under the NLRA's provisions on pre-hire agreements in the construction industry, have long been utilized throughout the United States on some of the largest and most complex construction projects, including the Grand Coulee and Shasta Dams, Cape Canaveral and the Alaska Pipeline. Their use is now commonplace and provides many benefits, including cost certainty, avoidance of work stoppages on long-term projects during which local collective bargaining agreements might expire, uniform work rules, and access to a steady supply of labor. *See, e.g.*, *Boston Harbor*, 507 U.S. at 218; *Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 266 (1983).

The use of project labor agreements will decline, however, if signatories face the unintended waiver of rights in local collective-bargaining agreements. The Ninth Circuit's decision in this case subjects signatories to this very scenario. Under the Ninth Circuit's holding, subcontracting grievances, regardless of how phrased, may be deemed "jurisdictional" by the PSA Arbitrator and their resolution channeled, "if need be, forcibly," into a forum providing different and perhaps

lesser remedies than those specified in the CBA between Local 38 and Huber. App. A, p. 16a. By depriving Local 38 of the forum and remedies it bargained for, the court effectuated the silent elimination of the subcontracting and hiring provisions in Local 38's collective-bargaining agreement. While the Ninth Circuit does not discuss this result, it will not escape notice by those in the construction industry. Faced with the potential loss of hard-fought contractual protections merely by participating in a project labor agreement, employers and unions alike will no doubt reconsider. The decreased use of project labor agreements will entail the loss of the benefits associated with such pre-hire agreements, a result clearly contrary to national labor policy. *Jim McNeff, Inc.*, 461 U.S. at 271.

CONCLUSION

For all the reasons stated above, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE *UNITED STATES* COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED MARCH 6, 2002

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 00-17085

D.C. Nos.
CV-00-0578-CRB
CV-00-2377-CRB

OPINION

HUBER, HUNT & NICHOLS, INC.,

Plaintiff-Counter-Defendant-Appellant,

v.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY, LOCAL 38,

Defendant-Counter-Claimant-Appellee.

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, District Judge, Presiding

Argued and Submitted
October 19, 2001—San Francisco, California

Filed March 6, 2002

Appendix A

Before: Robert R. Beezer, Stephen S. Trott and Richard C. Tallman, Circuit Judges.

Opinion by Judge Beezer

OPINION

BEEZER, Circuit Judge:

In this case, two arbitrators claim the power to decide a labor dispute under the same umbrella labor agreement. The parties to the agreement disagree over which arbitrator had power to arbitrate, what type of grievance was before the arbitrators and whether both grievances concerned the same dispute. Each party asks us to confirm one award and vacate the other.

The district court held that, under the circumstances, the question of arbitrability turned on analysis of the grievances rather than on analysis of the agreement. We have jurisdiction, and we reverse.

I

The facts are undisputed. Appellant Huber, Hunt & Nichols, Inc. (the "General Contractor") was hired to build Pacific Bell Park, the new ballpark of the Giants baseball club in San Francisco, California. Workers from several AFL-CIO-affiliated unions, including appellee United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 38 ("Local 38"), were hired to perform the construction work. The General Contractor

and the unions entered into a prehire agreement[1] (the "Project Stabilization Agreement" or "Agreement") reconciling the terms of the unions' various collective bargaining agreements for the duration of construction. The Agreement lists and incorporates by reference the unions' collective bargaining agreements, but makes them unenforceable to the extent that they are "contrary to or in conflict with" the Agreement or "the intent and meaning" thereof.

The Project Stabilization Agreement recites an intent to prevent delays and promote efficiency by establishing grievance procedures for settling "all misunderstandings, disputes or grievances which may arise" during construction of the ballpark. Article 5 of the Agreement requires that jurisdictional disputes[2] be decided by discussions between the adverse unions' local leadership or, failing that, their international leadership. Article 6 requires that *non*-jurisdictional disputes "concerning any application or

1. Prehire agreements are short-term umbrella labor contracts that preset dues, wage, representation, grievance and hiring practices for a particular construction project. *See Bldg. & Constr. Trades Council v. Assoc. Builders & Contractors, Inc.*, 507 U.S. 218, 231-32, 113 S. Ct. 1190, 1198, 122 L. Ed. 2d 565 (1993). They are illegal except in the construction industry. *See* National Labor Relations Act § 8(e), 29 U.S.C. § 158(e) (2000).

2. The Project Stabilization Agreement does not define "jurisdictional dispute" and the parties vigorously contest the precise meaning of this term. In the labor field, this term of art generally refers to disputes "involv[ing] a single employer caught between the conflicting demands of two or more unions." *Assoc. Gen. Contractors, Inc. v. Int'l Union of Operating Eng'rs, Local 701*, 529 F.2d 1395, 1397 (9th Cir. 1976).

interpretation of the Project Stabilization Agreement" be decided by a designated project-wide arbitrator (the "Permanent Arbitrator"). Non-jurisdictional disputes concerning any application or interpretation of an incorporated collective bargaining agreement, in contrast, are to be decided according to that collective bargaining agreement's "applicable grievance procedure." Local 38's collective bargaining agreement specifies that grievances arising under it are to be decided by an arbitration committee, half of whom must be members of Local 38 (the "Local Committee" or "Committee").

After construction commenced, Local 38 filed a grievance against the General Contractor with the Local Committee. Local 38 claimed that a subcontractor had violated Local 38's collective bargaining agreement by assigning work to carpenters and laborers that should have been assigned to Local 38 pipefitters.[3] Local 38 sought contract damages in the amount of lost wages.

In response, the General Contractor filed a grievance against Local 38 with the Permanent Arbitrator. The General Contractor claimed that Local 38's grievance violated the Project Stabilization Agreement by bypassing the Agreement's Article 5 procedures for resolving jurisdictional disputes. The General Contractor asked that Local 38 be ordered to resolve the dispute pursuant to Article 5 instead of by arbitration before the Local Committee. Each party

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3. The carpenters and laborers had their own union representation.

denied that the other's grievance was arbitrable. Each refused to make an appearance in the other's grievance proceeding.[4]

The Permanent Arbitrator issued an award. He concluded that he had power to decide the grievance before him and that the work assignment question was a jurisdictional dispute. He ordered Local 38 to use the Article 5 jurisdictional dispute resolution procedure instead of arbitration.

A week later the Local Committee issued an award. The Committee determined that it had power to decide the grievance before it and that the work assignment question was *not* a jurisdictional dispute. The Committee ruled that the General Contractor had violated Local 38's collective bargaining agreement and awarded lost wages as contract damages.

The General Contractor and Local 38 sued each other in federal court. Each sought to have its own award confirmed and the other's vacated. The district court granted summary judgment in favor of Local 38. The General Contractor appeals.

The district court had jurisdiction over this action "for violation of contracts between an employer and a labor organization. . . ." Labor Management Relations Act § 301(a), 29 U.S.C. § 185(a) (1998). *See Millmen Local 550, United Bhd. of Carpenters & Joiners v. Wells Exterior Trim*, 828 F.2d 1373, 1375 (9th Cir. 1987). We have jurisdiction pursuant to 28 U.S.C. § 1291.

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4. The General Contractor made a "special appearance" before the Local Committee solely to deny that the Local Committee had the power to decide the grievance.

Appendix A

II

We address whether the arbitrators had the power to arbitrate the matters before them. Arbitrability is generally a question for the court, rather than the arbitrator, except where a broad arbitration clause is susceptible to more than one interpretation on the question of arbitrability. *United Food & Commercial Workers Union, Local 770 v. Geldin Meat Co.*, 13 F.3d 1365, 1370 (9th Cir. 1994); *Southern Cal. Dist. Council of Laborers v. Berry Constr., Inc.*, 984 F.2d 340, 344 (9th Cir. 1993). We conclude that only the Permanent Arbitrator had power to arbitrate. The text, structure and context of the Project Stabilization Agreement assign to him the threshold determination whether or not a dispute is jurisdictional. The Permanent Arbitrator's award must be confirmed and the Local Committee's award vacated.

A.

The Permanent Arbitrator made the first ruling. He ruled that the dispute before him was jurisdictional. Local 38 contends that the Permanent Arbitrator lacked the power to issue his award. Local 38 notes that, under Article 6.4 of the Project Stabilization Agreement, non-jurisdictional disputes "concerning the application or interpretation of" a local bargaining agreement are not assigned to the Permanent Arbitrator and must instead follow the grievance procedures of the applicable local collective bargaining agreement.

The district court reviewed National Labor Relations Board rulings defining "jurisdictional dispute" and compared them to the claims contained in the grievances before each

arbitrator. The court concluded that (1) no jurisdictional dispute existed, (2) Local 38's grievance arose under the collective bargaining agreement, and (3) for both of these reasons, the Permanent Arbitrator had no power to arbitrate the matter before him.

The district court's arbitrability inquiry contains a fundamental fallacy. The court assumes that it, not the arbitrator, should decide whether or not the work assignment dispute is a "jurisdictional dispute." But this begs the threshold question. "The proper inquiry for this court is not whether the underlying dispute is arbitrable in and of itself; rather, we must ask whether the overall dispute, *which encompasses the disagreement over the nature of the underlying dispute,* is arbitrable under the terms of the [Project Stabilization Agreement]." *Berry*, 984 F.2d at 343. The underlying dispute here is the work assignment dispute. Whether the Permanent Arbitrator has the power to decide the work assignment dispute turns on the nature of that dispute. Before we reach the question of the Permanent Arbitrator's power to arbitrate the work assignment dispute, we must first decide whether he has the power to decide the arbitrability question himself.

The Project Stabilization Agreement sets forth the mutual intent of Local 38 and the General Contractor to "establish effective and binding methods for the settlement of *all* misunderstandings, disputes or grievances which may arise by establishing binding grievance *and* arbitration procedures" (emphases added). The broad arbitration clause routes disputes to one of two arbitrators based on whether they arise under the Project Stabilization Agreement or under an

incorporated local collective bargaining agreement. Jurisdictional disputes are expressly *excepted* from arbitration and consigned to a non-arbitral resolution procedure. The district court decided that this text and structure has assigned to the *court* the determination whether any particular grievance involved a jurisdictional dispute. We disagree.

We decline to label the underlying dispute here as either a jurisdictional or a contractual dispute. Rather, we examine whether the overall dispute is arbitrable. *Berry*, 984 F.2d at 343. When the Project Stabilization Agreement consigns all questions concerning the application or interpretation of the Agreement "excluding jurisdictional disputes" to the Permanent Arbitrator, it is implicitly assigning to him the threshold determination *whether* a dispute is jurisdictional. Under any other interpretation, a trip to court would be necessary whenever the parties disagreed, or even purported to disagree, whether a dispute was "jurisdictional" in character. It would be impossible to force any party to the Project Stabilization Agreement into the Article 5 procedures for resolving jurisdictional disputes without a court order. "[T]he arbitration clause would be swallowed up by the exception." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584, 80 S. Ct. 1347, 1354, 4 L. Ed. 2d 1409 (1960).[5]

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5. The district court cites *Van Waters & Rogers, Inc. v. IBT, Local 70*, 913 F.2d 736 (9th Cir. 1990), for the proposition that, where a labor arbitration clause expressly excludes jurisdictional disputes from arbitration, "any ruling on a jurisdictional dispute would be outside the scope of the arbitrator's authority." *Id.* at 740. But the *Van Waters* court follows this broad dictum with the clarification

(Cont'd)

Moreover, the Project Stabilization Agreement's broad arbitration clause explicitly assigns to the Permanent Arbitrator all non-jurisdictional disputes concerning the application or interpretation of the Agreement. The question of the character of the dispute in this case turns on the application and interpretation of the phrase "jurisdictional dispute" in Articles 5 and 6 of the Project Stabilization Agreement, not on the language of Local 38's collective bargaining agreement. It is difficult to imagine an inquiry that more squarely "concern[s] the application or interpretation of the Project Stabilization Agreement" and *not* the local collective bargaining agreement.

Finally, the Project Stabilization Agreement contains provisions, such as Articles 2.2 and 9.2, indicating that in any conflict between the Agreement and a local collective bargaining agreement, the Project Stabilization Agreement trumps the local agreement. Logic suggests that where, as here, one party seeks to have the Permanent Arbitrator determine whether a certain dispute is jurisdictional and the other seeks to have an arbitrator under a local collective bargaining agreement make the same determination, the Permanent Arbitrator under the Project Stabilization Agreement should have the power to resolve the conflict.

(Cont'd)

that disputes *associated* with a jurisdictional dispute need not be jurisdictional themselves. *Id.* at 741. The *Van Waters* court in fact upheld the arbitration award at issue in the case. *Id.* at 742 (noting that grievance was confined to non-jurisdictional dispute by stipulation of parties). Similarly, the question facing the Permanent Arbitrator, i.e., whether the underlying controversy was a jurisdictional dispute, was not *itself* a jurisdictional dispute.

Appendix A

In interpreting and enforcing labor agreements, " 'special heed should be given to the context in which [the] agreements are negotiated and the purpose which they are intended to serve.' " *NLRB v. Universal Servs., Inc.*, 467 F.2d 579, 584 n.6 (9th Cir. 1972) (quoting *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567, 80 S. Ct. 1343, 1346, 4 L. Ed. 2d 1403 (1960)). Only one arbitrator involved with this construction project has power over all the contractors and employees involved: the Permanent Arbitrator. The Project Stabilization Agreement was intended to promote economical and extra-judicial resolution of disputes arising during construction. That purpose is fostered by allowing the Permanent Arbitrator to assign disputes among the Project Stabilization Agreement's various dispute resolution procedures. It is not served by permitting the various parties merely by artfully wording their grievances to define the character of, and therefore the proper forum for, disputes.

Local 38 relies on *Frederick Meiswinkel, Inc. v. Laborer's Union Local 261*, 744 F.2d 1374 (9th Cir. 1984), for the proposition that arbitrability is a matter for the court to decide. *See also New England Mech., Inc. v. Laborers Local Union 294*, 909 F.2d 1339 (9th Cir. 1990). In *Meiswinkel,* a labor agreement had a broad arbitration clause with an exception for "jurisdictional disputes." 744 F.2d at 1376. The arbitrator decided the dispute on the merits notwithstanding this exception. *Id.* at 1377. We vacated the award as implausible. *Id.*

Meiswinkel and *New England Mechanical* are inapposite to this case. In *Meiswinkel* there was no real controversy whether a jurisdictional dispute existed; "[i]t [wa]s clear from the uncontroverted facts in the record that the dispute was

jurisdictional" and that the employer was "caught between rival demands." 744 F.2d at 1377. Nor was the arbitrator in *Meiswinkel* empowered to decide such a dispute on the merits; like the Permanent Arbitrator, he was expressly barred from doing so. *Id. New England Mechanical* presented essentially the same factual situation, and relied on *Meiswinkel* to come to the same result. *See* 909 F.2d at 1341, 1345.

In contrast, whether a jurisdictional dispute exists in the present case is hotly contested. The Permanent Arbitrator did not attempt to decide a jurisdictional dispute on the merits. He merely concluded that a jurisdictional dispute *existed,* and then consigned it to *non*-arbitral resolution.

Courts "have no business determining the *merits* of a grievance under the guise of deciding questions of arbitrability," *Geldin Meat*, 13 F.3d at 1368. The district court determined arbitrability by relying on rulings of the National Labor Relations Board defining the term "jurisdictional dispute." The extended inquiries into this complex question that occupy a large portion of the district court's order and fill the parties' briefs illustrate only too well the dangers of "becom[ing] entangled in the construction of the substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause." *Warrior & Gulf*, 363 U.S. at 585, 80 S. Ct. at 1354.[6]

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6. In looking to Article 5's jurisdictional dispute resolution procedures to inform our interpretation of Article 6's arbitration provisions, we in no way violate the general requirement that we "not look to substantive provisions," *Westinghouse Hanford Co. v.*

(Cont'd)

In sum, the Project Stabilization Agreement gives the Permanent Arbitrator, rather than a court, the power to decide whether grievances arising between the Agreement's parties are jurisdictional in character. The purpose of the Project Stabilization Agreement is to reconcile the various collective bargaining agreements involved with the project and to promote the simple and economical resolution of disputes. The Agreement's arbitration clause bars arbitration of jurisdictional disputes, *not* arbitration of the question whether a jurisdictional dispute exists. The Project Stabilization Agreement's language, structure and purpose all show an intent to assign questions concerning the character of disputes to the Permanent Arbitrator. The district court's conclusion that the Permanent Arbitrator lacked the power to determine whether a jurisdictional dispute existed is inconsistent with the intent of the parties and national labor policy.

We hold that the Permanent Arbitrator had the power to decide whether a jurisdictional question existed. The Permanent Arbitrator decided that this controversy whether work ought to have been assigned to members of the Laborers and Carpenters union or to members of the Pipefitters union gave rise to a jurisdictional dispute between

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(Cont'd)

Hanford Atomic Metal Trades Council, 940 F.2d 513, 516 (1991), when determining arbitrability. *See id.* at 521; *Bldg. Materials & Constr. Teamsters Local No. 216 v. Granite Rock Co.*, 851 F.2d 1190, 1194-95 (9th Cir. 1988). We *may* look to substantive provisions "insofar as it is necessary to consider *exclusions* to an arbitration clause." *Westinghouse Hanford*, 940 F.2d at 521 (emphasis added). In this case, we are interpreting Article 5's express exclusion of "jurisdictional disputes" from arbitration.

unions. We will not disturb this plausible conclusion.[7] *See New England Mech.*, 909 F.2d at 1345-46 (observing that arbitrators' awards are generally subject to "very limited and deferential review"). The award of the Permanent Arbitrator must be confirmed.

B.

We turn to the Local Committee's award. The district court decided that the dispute before the Local Committee was not jurisdictional in nature. Proceeding on the basis of this determination, the district court concluded that the dispute was arbitrable by the Local Committee and confirmed the Local Committee's award. We conclude that under the circumstances, the question whether the matter before the Local Committee was jurisdictional in nature was for the Permanent Arbitrator, not the district court or the Local Committee, to decide.

The Permanent Arbitrator had the power to determine that the work assignment dispute was jurisdictional and order Local 38 to pursue non-arbitral dispute resolution under Article 5 of the Project Stabilization Agreement.

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7. Local 38 urges us to characterize the work assignment dispute as a *contractual* dispute over whether work assignment promises were kept, rather than a jurisdictional dispute over who should actually do the work in question. *See infra* Part II-B. Given that the Permanent Arbitrator had the power to arbitrate, however, we must defer to his characterization of what type of dispute it is, "as long as [he is] even arguably construing or applying the contract." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38, 108 S. Ct. 364, 371, 98 L. Ed. 2d 286 (1987).

Appendix A

The Permanent Arbitrator's awards are final and binding upon the parties to the Agreement. When Local 38 refused to obey the Permanent Arbitrator's award and continued to pursue its grievance before the Local Committee, Local 38 violated the terms of the Project Stabilization Agreement.

Local 38 argues, however, that even assuming the Permanent Arbitrator had power to issue his award, we must *also* confirm the Local Committee's award because the grievance before the Committee involved a different dispute than the one before the Permanent Arbitrator. Local 38 notes that we distinguish "jurisdictional" disputes, where multiple unions seek the same work, from "contract" disputes, where employers "subcontract[ ] work away from its employees to the employees of another contractor . . . disregarding the provisions of its own collective bargaining agreement. . . ." *USCP-Wesco v. NLRB*, 827 F.2d 581, 585 (9th Cir. 1987); *see also Assoc. Gen. Contractors, Inc. v. Int'l Union of Operating Eng'rs, Local 701*, 529 F.2d 1395, 1398 (9th Cir. 1976); *Van Waters*, 913 F.2d at 741-42. Local 38 argues that the lost wages remedy ordered by the Committee can coexist with the dispute resolution remedy ordered by the Permanent Arbitrator, and that we must confirm the Committee's award whether or not we confirm the Permanent Arbitrator's award.

We generally will not vacate either of two "bipartite" arbitration awards by equipollent arbitrators, *United States Postal Serv. v. American Postal Workers Union*, 893 F.2d 1117, 1120 (9th Cir. 1990), except "to the extent necessary." *Sea-Land Serv., Inc. v. Int'l Longshoremen's & Warehousemen's Union, Locals 13, 63 & 94*, 939 F.2d 866, 873 (9th Cir. 1991). We may confirm two such awards even if their reasoning is incompatible.

Louisiana Pac. Corp. v. Int'l Bhd. of Elec. Workers, 600 F.2d 219, 223-25 (9th Cir. 1979). Nevertheless, Local 38's argument misses the point. The Permanent Arbitrator determined that Local 38 could not arbitrate its grievance before the Local Committee. Local 38 could not continue to prosecute its grievance before the Committee without violating the very Project Stabilization Agreement that Local 38 claimed gave the Committee the power to arbitrate the grievance in the first place.

The two arbitrators are not equipollent with respect to arbitrability determinations. The Project Stabilization Agreement gave the Permanent Arbitrator power to decide the character of the work assignment dispute. If *both* arbitrators could plausibly conclude that they had the power to do so, we would have to uphold both arbitrability determinations. *See Berry*, 984 F.2d at 343-44. In this case, given the text and context of the Project Stabilization Agreement, the Local Committee could not plausibly conclude that it had the power to contradict the Permanent Arbitrator's arbitrability determination.

In two consecutive and parallel clauses, Article 6 of the Project Stabilization Agreement divides arbitrable controversies between the Permanent Arbitrator and the Local Committee based on whether they arise out of the Project Stabilization Agreement or Local 38's collective bargaining agreement. Taken out of context, these parallel clauses might permit either arbitrator to plausibly assert power to decide the character, and thus the arbitrability, of disputes. *Cf. Bauhinia Corp. v. China Nat'l Mach. & Equip. Imp. & Exp. Corp.*, 819 F.2d 247, 250 (9th Cir. 1987) (holding that

similar parallel arbitration venue clauses were ambiguous and "le[ft] the issue [of venue] open"). But any ambiguity disappears in light of the Project Stabilization Agreement's stated purpose: to reconcile various labor agreements and provide for streamlined, economical dispute resolution. As we observed in *New England Mechanical,* even where a dispute is *concededly* jurisdictional,

> it is not important . . . whether the allocation of the work is ultimately made by the employer [or] the . . . union[ ]. . . . The issue is whether this jurisdictional dispute should be resolved by an arbitration panel whose members include representatives from only one of the affected unions. It seems unnatural to hold that the parties would have intended any such thing.

New England Mech., 909 F.2d at 1346.

This reasoning applies with even greater force where the parties cannot even agree on the character of the dispute. The Local Committee includes no representatives of any union other than Local 38. It would seem unnatural, not to mention anarchical, if each collective bargaining agreement's arbitrator could decide for itself whether it could resolve disputes that could detrimentally affect other unions or the General Contractor. It is far more logical to conclude that the Project Stabilization Agreement grants the Permanent Arbitrator the power to decide the dispute's character and, if need be, forcibly channel it into multi-union resolution.[8]

8. Indeed, the Project Stabilization Agreement is designed to trump the local collective bargaining agreements when there is (Cont'd)

Our interpretation is reinforced by considerations of federal labor policy. *See Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 470-71, 80 S. Ct. 489, 495-96, 4 L. Ed. 2d 442 (1960). It is true that ordinarily "judicial deference to an arbitrator's decision in a labor case is stronger than under arbitration obtained in the ordinary commercial context." *Louisiana Pac.*, 600 F.2d at 223 n.10. But ordinarily " 'arbitration is the *substitute* for industrial strife.' " *Id.* (emphasis added) (quoting *Warrior & Gulf*, 363 U.S. at 578, 80 S. Ct. at 1351). Here, by contrast, strong deference to the Local Committee's determination of arbitrability would lead to "the very kind of industrial strife and unrest which it is the objective of national labor policy to avoid." *Int'l Ass'n of Machinists v. Howmet Corp.*, 466 F.2d 1249, 1253 (9th Cir. 1972).

Howmet presents the analogous context of orders compelling labor arbitration. In that context we said:

> [T]he underlying objective of the policy favoring the resolution of disputes by arbitration is that of avoiding industrial strife and promoting industrial harmony through a fair, fast, and flexible system utilizing neutral but knowledgeable "peace-makers." That objective is served by a strong judicial policy . . . of broadly construing the arbitration clauses of collective bargaining

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(Cont'd)

a conflict. Our cases that have permitted two arbitration awards, *see Assoc. Gen.*, 529 F.2d 1395; *Louisiana Pac.*, 600 F.2d 219, did not involve overarching, multi-union labor agreements like the Project Stabilization Agreement.

> agreements and requiring the disputing parties to arbitrate whenever their agreement is possibly susceptible of an interpretation permitting such action. However, when situations arise, as here, in which the objective of avoiding industrial strife and disharmony would not be served by compelling arbitration, a court has the obligation to examine the potential consequences of compelling arbitration and to tailor its order accordingly.

Id. We proceeded to refuse to enforce a collective bargaining agreement's arbitration clause on policy grounds. *Id.* at 1253-55.

These policy considerations are equally applicable to project-wide labor agreements that exist for the purpose of unifying dispute resolution procedures and quelling labor strife. Even if the Project Stabilization Agreement arguably *permitted* the Local Committee to make arbitrability determinations without regard to contrary determinations by the Permanent Arbitrator, enforcing such an award would be against federal labor policy. "It is the [Local Committee's] arbitration itself . . . which gives rise to the unrest and dissatisfaction which national labor policy seeks to prevent." *Id.* at 1255.

III

The substantive dispute between the parties in this case is distinctly different from the dispute over which arbitrator had the power to hear the matter. The district court erroneously concluded that the determination of who had the power to hear the matter depended upon the substance of the grievances.

Appendix A

We hold instead that the answer depended upon the text, structure, and context of the project-wide labor agreement, and that the question was properly decided by the Permanent Arbitrator. The Permanent Arbitrator's award must be confirmed, and the Local Committee's award vacated.

The cause is REVERSED and REMANDED to the district court for further proceedings consistent with this opinion.

APPENDIX B — ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA DATED OCTOBER 3, 2000, FILED OCTOBER 5, 2000 AND ENTERED OCTOBER 12, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 00-0578 CRB

ORDER REGARDING PLAINTIFF'S MOTION AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

HUBER, HUNT & NICHOLS, INC.,

Plaintiff & Counterdefendant,

v.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY LOCAL 38,

Defendant & Counterclaimant.

Appendix B

No. C 00-2377 CRB

ORDER REGARDING PLAINTIFF'S MOTION AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

HUBER, HUNT & NICHOLS, INC.,

Plaintiff & Counterdefendant,

v.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY LOCAL 38,

Defendant & Counterclaimant.

Now before the Court is the plaintiff's motion for summary judgment and the defendant's cross-motion for summary judgment. Having considered the parties' papers, and having had the benefit of oral argument on September 29, 2000, the plaintiff's motion for summary judgment is GRANTED IN PART and DENIED IN PART, and the defendant's cross-motion for summary judgment is GRANTED IN PART and DENIED IN PART.

BACKGROUND

The plaintiff and counter-defendant Huber, Hunt & Nichols, Inc. ("Huber") is a general contractor. The defendant and counterclaimant United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry Local

38 ("Local 38") is a union representing plumbers, pipefitters, and certain mechanics. Both parties are signatories to a Project Stabilization Agreement ("PSA") that covers work on the Pacific Bell Ballpark Project ("the Project").

Local 38's collective bargaining agreement ("CBA") establishes limits on contractors' ability to use non-union persons or persons from other unions to perform work covered by the CBA. *See* Morbello Decl., Sept. 8, 2000, Ex. 2, arts. I, II, and X (outlining the coverage of the CBA, hiring procedures, and the scope of the work covered by the CBA). Section 9.1 of the PSA incorporates the Local 38 CBA by reference. *See id.*, Ex. 1, § 9.1. Section 2.4 of the PSA specifically binds Huber's subcontractors to the provisions of the CBA. *See id.* § 2.4. However, section 2.2 of the PSA provides that any provision of a CBA that conflicts with the PSA shall not be enforced. *See id.* § 2.2.

The PSA also governs how disputes regarding a union's CBA that arise under the PSA shall be resolved. It provides that "jurisdictional" disputes are covered by the PSA grievance process, while all other disputes are to be resolved under the relevant CBA. *See id.* § 6.4 ("Any dispute, excluding jurisdictional disputes (Article 5), concerning any application or interpretation of a Local Collective Bargaining Agreement shall be subject to the applicable grievance procedure of said Local Collective Bargaining Agreement."). The PSA itself does not expressly define what is meant by a "jurisdictional" dispute.

On January 18, 2000, Local 38 filed a grievance against Huber with an arbitration committee established pursuant to

the union's CBA. Local 38 alleged three separate violations of the CBA: (1) Huber allowed its subcontractors to assign work to individuals who were not members of Local 38 ("the hiring dispute"); (2) Huber subcontracted work to subcontractors who were not bound by the CBA ("the subcontracting dispute"); and (3) Huber subcontractors were permitting the off-site fabrication of materials incorporated into the Project ("the pre-fabrication dispute" and collectively "the three disputes"). *See id.*, Ex. 3 (containing the grievance letter from Local 38 to Huber). Meanwhile, on February 9, 2000, Huber filed a grievance against Local 38 under the PSA's arbitration procedures regarding the same disputes. Thus, the parties were simultaneously pursuing competing arbitrations regarding whether Huber had violated the CBA.

On February 16, 2000, Huber received an initial award from the PSA arbitrator ("the first PSA award"). The PSA arbitrator addressed the hiring and subcontracting disputes, but deferred a ruling on the pre-fabrication dispute. He determined that the hiring and subcontracting disputes were jurisdictional in nature. As a result, he concluded, the disputes required resolution under the arbitration procedures of the PSA, and not under the arbitration procedures of Local 38's CBA. On June 7, 2000, Huber received a second judgment from a PSA arbitrator regarding the pre-fabrication dispute ("the second PSA award"). The PSA arbitrator determined that the PSA extended only to on-site work, that Huber and its subcontractors were not bound by the off-site restrictions in Local 38's CBA, and that Huber and its subcontractors did not violate the PSA.

Appendix B

On February 23, 2000, Local 38 obtained an award in its favor from the arbitration committee ("the committee award"). The arbitration committee addressed all three of the disputes (the hiring and subcontracting disputes as well as the pre-fabrication dispute). It found that there was no bona fide jurisdictional dispute involved in the grievance, and that the PSA therefore did not apply. Then, under the terms of the CBA, the committee found that Huber had breached the hiring, subcontracting, and pre-fabrication provisions of the CBA, and awarded damages against Huber.

DISCUSSION

The parties have filed suit in this Court to determine which arbitration award (or awards) should bind the parties. The plaintiff has moved for summary judgment that the first and second PSA awards should be confirmed and the committee award should be vacated, while the defendant has cross-moved that the committee award should be confirmed and the PSA awards should be vacated.[1] The parties agree that no issues of material fact remain to be resolved.

For the purposes of their summary judgment motion and cross-motion, the parties have divided their arguments regarding the three disputes (hiring, subcontracting, and pre-

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1. The plaintiff initially filed a suit to confirm the first PSA award (No. C 00-0578), and later filed a suit to confirm the second PSA award (No. C 00-2377). This Court determined that the cases were related, and this Order will govern both cases. The defendant has also moved for attorney's fees pursuant to section 76(t) of the CBA. However, neither party has briefed the issue in their papers, and this Order will not address the defendant's request for fees.

fabrication) into two stages. First, the parties contest whether the hiring and subcontracting grievances presented a jurisdictional dispute. The plaintiff argues that the defendant's January 18 grievance regarding the hiring and subcontracting claims raised a jurisdictional dispute and therefore should have been resolved under the PSA arbitration procedures, while the defendant claims that its challenges were not jurisdictional and that the CBA established the proper means for dispute resolution.

Second, the plaintiff argues that the pre-fabrication dispute arose under the PSA, and that the PSA arbitrator had the authority to interpret the PSA to determine if the pre-fabrication provisions of the CBA were applicable. On the other hand, the defendant argues that the pre-fabrication provisions were not covered by the PSA. It concludes that the CBA provisions govern and that the CBA arbitration procedure was the appropriate forum to resolve its claim.

I. STANDARD OF REVIEW FOR SUMMARY JUDGMENT

Summary judgment is appropriate when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" only if there is sufficient evidence for a reasonable fact finder to find for the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). A fact is "material" if the fact may affect

the outcome of the case. *See id.* at 248. "In considering a motion for summary judgment, the court may not weigh the evidence or make credibility determinations, and is required to draw all inferences in a light most favorable to the non-moving party." *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997). A principal purpose of the summary judgment procedure is to identify and dispose of factually unsupported claims. *See Celotex Corp. v. Cattrett*, 477 U.S. 317, 323-24 (1986).

The party moving for summary judgment bears the initial burden of identifying those portions of the pleadings, discovery, and affidavits which demonstrate the absence of a genuine issue of material fact. *See id.* at 323. Where the moving party will have the burden of proof on an issue at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. *See id.* Once the moving party meets this initial burden, the non-moving party must go beyond the pleadings and by its own evidence "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The non-moving party must "identify with reasonable particularity the evidence that precludes summary judgment." *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996) (quoting *Richards v. Combined Ins. Co.*, 55 F.3d 247, 251 (7th Cir. 1995), and noting that it is not a district court's task to "scour the record in search of a genuine issue of triable fact"). If the non-moving party fails to make this showing, the moving party is entitled to judgment as a matter of law. *See Celotex*, 477 U.S. at 323.

Appendix B

II. STANDARD FOR REVIEWING ARBITRATION AWARDS

Both parties agree that this Court may confirm or vacate arbitration awards issued under the Labor Management Relations (Taft-Hartley) Act of 1947 ("LMRA"). However, the degree to which a district court can review an award is "extremely narrow." *Federated Dep't Stores v. United Food & Commercial Workers Union, Local 1442*, 901 F.2d 1494, 1496 (9th Cir. 1993). Our scrutiny of an arbitration award must be "limited and highly deferential," and we are bound to enforce the arbitrator's judgment so long as the award "represents a plausible interpretation of the contract." *Line Drivers, Pickup and Delivery, Local 81 v. Roadway Express Inc.*, 152 F.3d 1098, 1099 (9th Cir. 1998) (internal quotations and citations omitted) (noting that a district court should defer to the arbitrator even if the decision "finds the facts and states the law erroneously").

Deciding to vacate an award is a difficult but not impossible standard. While a court has "no business" overruling an arbitrator merely because it interprets a contract differently, an arbitrator may not ignore the "plain language" of the contract or reach a decision that is not plausible. *Hawaii Teamsters and Allies Workers Union, Local 996 v. United Parcel Serv.*, 2000 WL 1252101, at *3 (9th Cir. 2000) (internal quotations omitted). There are three exceptions to the general rule that a district court should defer to an arbitrator's decision: "(1) when the arbitrator's award does not 'draw its essence from the collective bargaining agreement' and the arbitrator is dispensing 'his own brand of industrial justice'; (2) when the arbitrator exceeds the

boundaries of the issues submitted to him; and (3) when the award is contrary to public policy." *Federated Dep't Stores*, 901 F.2d at 1496 (internal citations omitted). In evaluating when an award is contrary to public policy under the third exception, a court may look to the policies outlined in the Federal Arbitration Act. *See* 9 U.S.C. § 10 (permitting a court to vacate an award where the arbitrator "exceeded [its] powers" under section 10(a)(4)).[2] However, the public policy exception is limited; the parties must identify the laws and legal precedents that are implicated and not simply some "general considerations of supposed public interests." *International Bhd. of Electrical Workers, Local 97 v. Niagara Mohawk Power Corp.*, 196 F.3d 117, 125 (2d Cir. 1999) (quoting *W.R. Grace & Co. v. International Union of United Rubber Workers, Local 759*, 461 U.S. 757, 766 (1983)), *cert. dismissed*, 2000 WL 1051888 (2000).

The parties (and case law) do not provide much guidance for a court faced with two competing arbitration awards. When there are three parties involved in a jurisdictional dispute and two of the parties have obtained conflicting bipartite arbitrations, the Ninth Circuit has upheld inconsistent awards as reinforcing the important role of arbitration in resolving labor disputes. *See Louisiana-Pacific Corp. v. International Bhd. of Electrical Workers, Local 2294*,

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2. In the Ninth Circuit, the Federal Arbitration Act is inapplicable to disputes arising out of labor contracts, but the Act articulates standards that contribute to the body of federal law by which arbitrations in labor disputes may be reviewed. *See Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1094 (9th Cir. 1998); *Pacific & Arctic Ry. and Nav. Co. v. United Transp. Union*, 952 F.2d 1144, 1148 (9th Cir. 1991).

600 F.2d 219, 223 (9th Cir. 1979) (confirming conflicting arbitration awards for two unions based on different CBAs). It is possible, according to the reasoning in *Louisiana-Pacific*, that this Court would be forced to defer to both the PSA awards and the committee award if the Court cannot identify sufficient grounds for vacating one of the awards.

However, the Ninth Circuit's decision in *Louisiana-Pacific* is distinct in several ways. First, the CBAs that the arbitrators in *Louisiana-Pacific* interpreted did not overlap with each other, unlike the PSA and the Local 38 CBA, which contain specific provisions outlining the interaction between the contracts. Second, the employer in *Louisiana-Pacific* was challenging arbitration results arising from a jurisdictional dispute regarding which union should receive the work in question. As discussed *infra*, *see* Section III, this case did not involve a jurisdictional dispute where Huber was forced to choose between two unions with whom it had signed a CBA. Third, the Ninth Circuit observed that the employer in *Louisiana-Pacific* had failed to take advantage of several procedural opportunities to avoid the risk of conflicting awards. *See id.* at 224-26 ("At several stages the Company made choices as to collective bargaining and litigation strategies. It must now abide the consequences of those choices."). It does not appear that either party had a similar opportunity here. Finally, the policy justifications for deferring to an arbitration award — such as ensuring the effectiveness of arbitration as an alternative dispute resolution process — may not be as pressing in a case where two parties have obtained separate and incompatible arbitration awards. Indeed, permitting parties to race to an arbitrator to try to obtain an award to which this Court must defer may undermine the efficacy of the arbitration process.

Thus, there is not much guidance for a district court faced with the dilemma of two competing, incompatible arbitration awards — both ostensibly entitled to narrow, deferential review — obtained outside the context of a jurisdictional dispute. If this Court found itself in a position of having to confirm two contradictory awards, it would wonder how to resolve the parties' dispute. However, as described *infra*, this case does not present that intractable question. Instead, it turns out that there are clear grounds for evaluating each award.

III. WHETHER THE HIRING AND SUBCONTRACTING DISPUTES WERE "JURISDICTIONAL" DISPUTES

The parties dispute whether the January 18 grievance was jurisdictional in nature. If the grievance was a jurisdictional dispute, then under section 6.4 of the PSA, the parties should have employed the PSA dispute resolution process. The PSA awards should therefore be confirmed and the committee award should be vacated. On the other hand, if the grievance did not provoke a jurisdictional dispute, the parties were bound to use the CBA arbitration procedures. Accordingly, the committee award should be confirmed and the PSA awards should be vacated.

Jurisdictional disputes are controversies between two or more unions where the unions disagree over which union should receive a work assignment from a contractor. *See Associated General Contractors of America, Inc. v. International Union of Operating Engineers, Local 701*, 529 F.2d 1395, 1397 (9th Cir.) (describing post-World War II concern about labor strikes over jurisdictional disputes and

the resulting provisions of the LMRA that authorize the National Labor Relations Board ("NLRB" or "Board") to resolve jurisdictional disputes), *cert. denied*, 429 U.S. 822 (1976).[3] When two unions seek assignment of the same work from a single contractor caught between two CBAs, the employer may be "caught in the middle, necessarily unable to satisfy both unions, and sometimes unable to satisfy either." *The Developing Labor Law: The Board, the Courts, and the National Labor Relations Act* 1366-67 (Patrick Hardin et al. eds., 3d ed.1992). Since the 1960s, "the Board has concluded that there can be no jurisdictional dispute . . . unless there are two competing claims to the particular work . . ." *Id.* 1374 (noting that the purpose of distinguishing jurisdictional disputes is to "protect a neutral employer from a dispute between two groups claiming the same work, not a means to arbitrate disputes between an employer and a single labor organization").

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3. Two significant provisions of the LMRA address jurisdictional disputes. Section 8(b)(4)(d) of the LMRA, 29 U.S.C. § 158(b)(4)(D), outlines the conduct on the part of a union involved in a jurisdictional dispute that constitutes an unfair labor practice. That section provides that a union has committed an unfair labor practice when it engages in a strike or work stoppage when the object of that behavior is "forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class . . ." Section 10(k) of the LMRA, 29 U.S.C. § 160(k), provides that the NLRB is empowered to resolve jurisdictional disputes whenever it is charged that a person has engaged in an unfair labor practice as defined by section 8(b)(4)(D).

Appendix B

If a union files a grievance under its agreement with the general contractor alleging violation of a subcontracting clause, and seeks only enforcement by arbitration of the subcontracting clause, the dispute is not jurisdictional. The dispute is only jurisdictional where the union "pursues not only its contractual remedies against the employer with whom it has the agreement but also directs a claim for the work to the subcontractor . . ." *The Developing Labor Law: The Board, the Courts, and the National Labor Relations Act* 557 (Christopher T. Hexter et al. eds., 1999 Supp.) (discussing *Laborers (Indiana Dist. Council) (Capitol Drilling Supplies)*, 318 N.L.R.B. 809 (1995) ("*Capitol Drilling*")).

In *Capitol Drilling*, the NLRB evaluated whether a union's grievance against a contractor involved a jurisdictional dispute. There, a contractor had signed a CBA with the Operating Engineer union, while its subcontractor assigned work to employees represented by the Laborers union. The Operating Engineers filed a grievance against the contractor alleging a violation of a subcontracting restriction in its CBA, but the union did not pursue any other action such as engaging in a strike or a work stoppage or demanding that the subcontractor reassign the work to the Operating Engineers. *See Capitol Drilling*, 318 N.L.R.B. at 809. The subcontractor argued that the dispute was jurisdictional, because the parties disputed which union should receive the work, whereas the Operating Engineers argued that it "never sought the work in question from [the subcontractor], nor has it threatened or coerced [the subcontractor] in order to acquire such work . . ." *Id.* at 810.

Appendix B

The NLRB recognized that cases such as this one involve "two entirely separate disputes, even though both ultimately concern the same work." *Id.* The first dispute involves the contractor's alleged breach of its agreement with the first union, and the second dispute arises when the second union to whom the work was allegedly improperly assigned threatens to take coercive action against the subcontractor if the work is reassigned to the first union bringing the grievance. *See id.* Such disputes are undoubtedly related, because "the first union's successful prosecution of its grievance may, as a practical matter, induce the general contractor to withdraw the work from the subcontractor or otherwise bring about the removal of the employees represented by the second union . . ." *Id.* However, when the first union only seeks to enforce the provisions of its CBA with the contractor, "the fact remains that the first union never engaged in any dispute with the subcontractor. And in such a case the general contractor's actions reflect merely its fulfillment of its union signatory subcontracting obligation under the collective-bargaining agreement with the first union." *Id.*

The NLRB found that distinguishing between these layers of dispute was supported by the policy considerations underlying the relevant sections of the labor code: namely, protecting an employer from being caught in the middle of a dispute between two unions. *See id.* at 811 (noting that such a rule also "will encourage general contractors to abide by lawful signatory clauses in agreements into which they have voluntarily entered"). Ultimately, the NLRB agreed with the Operating Engineers that its dispute was not jurisdictional:

> [W]e hereby . . . adopt the view that, in the construction industry, a union's action through a

> grievance procedure, arbitration, or judicial process, to enforce an arguably meritorious claim against a general contractor that work has been subcontracted in breach of a lawful union signatory clause, does not constitute a claim to the subcontractor for the work, provided that the union does not seek to enforce its position by engaging in or encouraging strikes, picketing, or boycotts or by threatening such actions.

Id. at 810; *see id.* at 811-12 ("[I]f a union seeking enforcement of a union signatory clause not only pursues its contractual remedies against the employer with which it has the agreement, but also makes a claim for the work directly to the subcontractor that has assigned the work, then we will find truly competing claims . . ."); *id.* at 812 ("Furthermore, if the union that has been pursuing its contract breach claim against the general contractor fails to confine itself to purely peaceful means, but also communicates an intent to disrupt the assignment of work by coercive means, we will deem this to be a competing claim for the work even if the coercive message was communicated only indirectly to the subcontractor that assigned the work.").

Thus, the essential question here is whether the grievance filed by Local 38 against Huber merely sought to enforce the provisions of the CBA against Huber or whether Local 38 also sought to have the work Huber gave to its subcontractors reassigned to its workers. If Local 38 did not seek to enforce its position by engaging in work stoppages or other coercive means, and did not request a reassignment of the work from Huber's contractors, then Local 38 is merely seeking to

enforce its contract with Huber, and it has not provoked a jurisdictional dispute. On the other hand, if Local 38 did request reassignment of the work, its grievance would raise a challenge of a jurisdictional nature.

As the defendant notes, "Local 38's grievance does not raise a jurisdictional dispute as it does not involve the assignment of work by Huber directly to another union with which [Huber] has a [CBA]. Rather, Huber subcontracted the work to other employers who did not have [CBAs] with Local 38." Defendant and Counterclaimant's Opposition to Plaintiff and Counterdefendant's Cross-Motion for Summary Judgment, May 5, 2000, at 4. The record does not reflect that Local 38 sought reassignment of the work from the subcontractors at any time. The grievance letter itself does not indicate that Local 38 was seeking reassignment, nor did the committee arbitration award seek to assign the work to Local 38. *See* Morbello Decl., Exs. 3 & 8 (containing the grievance letter and the committee arbitration award). Instead, the union only pursued contractual damages against Huber. Thus, according to the reasoning in *Capitol Drilling*, the January 18 grievance did not raise a jurisdictional dispute and should have been resolved under the CBA dispute resolution procedures.

The plaintiff protests that *Capitol Drilling* has been limited by *Laborers' International Union of North America, Local 113 v. Super Excavators, Inc.*, 327 N.L.R.B. 31, 1998 WL 799279, at *3 (N.L.R.B. 1998), in which the NLRB noted that a "pay-in-lieu" grievance could still raise a genuine jurisdictional dispute. *See id.* at *3 & n.6. In *Laborers' International*, a union filed a grievance against an employer

that had signed CBAs with two competing unions, seeking both assignment of the work and pay as compensation for the breach of its CBA. The union that filed the grievance had stated in a demand letter to the employer, "Of course, we would rather see [the work involved] assigned to a member of our bargaining unit in accordance with the bargaining agreement." *Id.* at *2.

The Board concluded that there were in fact competing claims for the work (and therefore there was a jurisdictional dispute), because the employer was in the impossible position of assigning work to two competing unions with which the employer had signed a CBA. Moreover, the NLRB distinguished *Capitol Drilling*, claiming that *Capitol Drilling* had involved two truly separate disputes: one between the union and the contractor for breach of contract and one between the union and the subcontractor for reassignment of the work. The Board determined that the dispute in *Laborers' International* was different since there was only one employer involved and each of the unions had attempted to establish its claim to the work. *See id.* at *3 n.6. Ultimately, the Board recognized that the union's claim did in fact raise a jurisdictional issue, and held that a pay-in-lieu grievance could constitute a competing claim for work. *See id.* at *3 (noting that the union that filed the grievance had sought assignment of the disputed work "despite its protestations" to the contrary). In essence, relying on the wording in the union's demand letter and the identities of the parties (one employer who had signed CBAs with two competing unions), the Board refused to ignore the underlying jurisdictional nature of the dispute.

However, the present dispute more closely resembles *Capitol Drilling* than *Laborers' International.* Here, Huber had not signed a CBA with two separate unions, putting itself in the untenable position of violating one CBA by assigning the work to the other union. Instead, Huber violated the CBA by assigning the work to subcontractors who were not signatories to Local 38's CBA. Moreover, there is no evidence in the record that Local 38 sought reassignment of the work. Local 38 merely sought to enforce the subcontracting provisions of its CBA by demanding damages. As such, this dispute is just like *Capitol Drilling*, and lacks the underlying factors in *Laborers' International* that led the NLRB to conclude that there was in fact a jurisdictional issue there.[4]

Huber also argues that "the authority to decide whether a jurisdictional dispute exists is within the authority granted to the Permanent Arbitrator by the parties to the PSA."

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4. For cases similar to *Laborers' International* that found that grievances were jurisdictional in nature when a union did more than merely seek to enforce contractual provisions, see *United Bhd. of Carpenters & Joiners of America, Local 210 v. Component Assemblies Systems, Inc.*, 327 N.L.R.B. 4, 1998 WL 761873, at *3 n.2 (N.L.R.B.1998) (finding that a union that asserted that work should be assigned in its favor had raised a jurisdictional dispute); *International Bhd. of Electrical Workers, Local 363 v. U.S. Information Systems, Inc.*, 326 N.L.R.B. 145, 1998 WL 723994, at *4 (N.L.R.B. 1998) (determining that a claim was jurisdictional when a union approached a subcontractor and declared that the subcontractor was "stealing" the union's work, thereby failing to confine its action to a peaceful pursuit of its contract claim). These cases are distinct from *Capitol Drilling* and the present dispute, however, in that Local 38 did not engage in any of the behavior identified by these courts as presenting a jurisdictional dispute.

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Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant and Counterclaimant's Cross-Motion for Summary Judgment, May 9, 2000, at 2. Huber cites Article 5 of the PSA for that proposition, but does not cite specific contractual language within the article. In fact, even a cursory examination of Article 5 reveals that the PSA merely establishes how jurisdictional disputes should be resolved. Contrary to the plaintiff's assertions, the PSA does not provide that the PSA arbitrator shall also decide the threshold question of whether a grievance raises a jurisdictional dispute in the first instance. That conclusion of the PSA arbitrator is not a plausible interpretation of the PSA's plain language.

Indeed, the question of arbitrability is "undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *AT & T Techs. v. Communications Workers*, 475 U.S. 643, 649 (1986). Thus, because the parties did not "clearly and unmistakably" provide that whether a grievance was jurisdictional in the first place should be determined by the PSA arbitrator, this Court — and not the PSA arbitrator — must determine whether the defendant's grievance was jurisdictional. Because the Court concludes that the grievance was not jurisdictional in nature, it also decides that the parties did not agree to arbitrate that issue under the PSA.

Thus, the Court concludes that Local 38's January 18 grievance did not raise a jurisdictional dispute. Local 38's grievance arose under the CBA, and under section 6.4 of the PSA, all disputes involving the CBA must be resolved under the CBA's dispute resolution procedures. As a result, the parties should have used the CBA arbitration procedures.

Accordingly, the first PSA award must be vacated. The first PSA award did not "draw its essence" from the PSA or the CBA, and the PSA arbitrator's decision was not a plausible interpretation of the plain language of the PSA. Furthermore, the PSA arbitrator did not have the authority to resolve a non-jurisdictional dispute and exceeded his powers in issuing an award. *See Van Waters & Rogers Inc. v. International Bhd. of Teamsters, Local 70*, 913 F.2d 736, 740 (9th Cir. 1990) (noting that an arbitrator's ruling on a jurisdictional dispute contrary to the provisions of a CBA were outside the scope of the arbitrator's authority). Moreover, the first PSA award was contrary to public policy. As the NLRB noted in *Capitol Drilling*, distinguishing between jurisdictional and non-jurisdictional disputes under the LMRA is important both to protect employers from unfair labor practices on the part of unions on the one hand and to encourage contractors to abide by the provisions of CBAs on the other. In fact, permitting a party to race to an arbitrator to obtain a favorable ruling merely to force a district court to defer to that award may undermine the critical role of arbitration in resolving labor disputes. Thus, there are specific laws and legal precedents that are served by vacating the first PSA award, not just general considerations of supposed public interests.[5]

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5. It is not clear whether the public policy reasoning in *Capitol Drilling* is sufficiently specific to justify vacating the first PSA award on its own. However, combined with the fact that the PSA arbitrator exceeded his authority by determining whether the dispute was jurisdictional (which was not a plausible reading of the PSA), the public policy exception at the very least provides an additional reason for vacating the award.

By contrast, the committee award must be confirmed as to the hiring and subcontracting disputes, as that award drew its essence from the CBA and was a plausible interpretation of the CBA. The arbitration committee did not exceed its powers to review the hiring and subcontracting disputes, because those disputes were not jurisdictional in nature and were properly handled under the CBA dispute resolution procedure.

As a result, the plaintiff's motion for summary judgment is DENIED as to the first PSA award, and the defendant's cross-motion for summary judgment is GRANTED as to those disputes. The first PSA award is VACATED, and the committee award is CONFIRMED as to the hiring and subcontracting disputes.

IV. THE SECOND PSA AWARD FOR OFF-SITE WORK

Both parties agree that the pre-fabrication dispute initially turns on the meaning of the PSA. Local 38 argues that the PSA arbitrator ignored clear language in the PSA limiting his authority to hear grievances involving a breach of the Local 38 CBA. Huber counters that the PSA dispute resolution procedure governs any conflict regarding the meaning of the PSA, and that the PSA arbitrator's conclusions should therefore be reviewed with deference by this Court.

Section 2.1 of the PSA outlines the scope of the agreement. It states that the PSA applies "only to onsite construction work as designated by the Owner . . . and performed during the term of this Agreement by signatory Contractor and Subcontractors." Morbello Decl., Ex. 1,

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§ 2.1. "There shall be no interference with vendor or supplier deliveries of equipment, apparatus, machinery, and construction materials to the job site since such deliveries shall not fall under this Agreement." *Id.*; *see id.* § 2.3 ("This Agreement shall only cover onsite construction work contracted by the Owner to the signatory Contractor hereto."). Section 2.2 provides that any provision of a CBA contrary to the PSA "shall not be enforced" against Huber. *Id.* Finally, section 6.5 outlines the dispute resolution procedures that govern any disagreements regarding the application of interpretation of the PSA. *See id.* § 6.5.

The PSA arbitrator interpreted these provisions to signify that the PSA dispute procedures had to be employed for any conflict over the meaning of the PSA. According to his view, whether off-site pre-fabrication was covered by the PSA depended on the construction of the PSA, especially the term "onsite" in sections 2.1 and 2.3. The PSA arbitrator concluded that the PSA was limited to onsite work and could not be invoked to challenge a contractor's off-site activities. As a result, he determined, the PSA — with no limits on off-site pre-fabrication — was inconsistent with Local 38's CBA, with its pre-fabrication provision limiting off-site work by a contractor. The PSA arbitrator found that because section 2.2 of the PSA specifically indicates that CBA provisions that conflict with the PSA will not be enforced, the pre-fabrication provisions of the CBA did not apply to Huber and would not be enforced. Ultimately, he concluded that the plaintiff therefore had not violated the terms of the PSA.

Local 38 counters that the PSA arbitrator's reading is not a plausible interpretation of the PSA. The union contends

that the term "onsite" means that the PSA simply contained no guidance as to limitations on off-site work. Because the PSA is silent, Local 38 asserts, the CBA provisions on pre-fabrication must govern, and the arbitrator did not have authority to hear a grievance over off-site work. The defendant concludes that the PSA arbitrator exceeded his authority by rendering an award.

The defendant's argument is not persuasive. Although this Court might not construe the PSA in the same manner as the PSA arbitrator, we have "no business" overruling an arbitrator merely because we might interpret the PSA differently. *Hawaii Teamsters*, 2000 WL 1252101, at *3. Under the PSA, the PSA arbitrator is given the authority to interpret the meaning of the PSA itself, which includes determining the meaning of the term "onsite" and whether pre-fabrication provisions of a CBA survive the PSA. We cannot conclude that the second PSA award ignores the plain language of the PSA or relies on an implausible interpretation. Where the parties "have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987) (noting that a court may not reject an arbitrator's interpretation of the contract "simply because it disagrees" with the arbitrator). The Court must be mindful of the narrow scope of review applied to an arbitrator's decision in such circumstances. Because the second PSA award — which concluded that the PSA did not extend to off-site work — was a reasonable interpretation of the PSA, that award must be confirmed.

On the other hand, the arbitration committee's award with respect to the pre-fabrication dispute must be vacated.

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The arbitration committee exceeded its authority in interpreting the meaning of the PSA. Moreover, its view that the CBA (and not the PSA) governed the pre-fabrication dispute is not a plausible interpretation of the PSA given the language in section 6.5. Indeed, the defendant's brief seems to concede that the language of the PSA governed the dispute, as Local 38 merely seeks to argue that the second PSA award was not a plausible interpretation of the PSA, and not that the PSA arbitrator exceeded his authority in even hearing the dispute in the first place.

CONCLUSION

For the foregoing reasons, the plaintiff's motion for summary judgment is DENIED as to the first PSA award (involving the hiring and subcontracting disputes), but GRANTED as to the second PSA award (involving the pre-fabrication dispute). The defendant's cross-motion for summary judgment is GRANTED as to the arbitration committee's award for the hiring and subcontracting disputes, but is DENIED as to the pre-fabrication disputes. As a result, the first PSA award is VACATED, the second PSA award is CONFIRMED, and the committee award is CONFIRMED IN PART (for the hiring and subcontracting disputes) and VACATED IN PART (for the pre-fabrication dispute).

IT IS SO ORDERED.

Dated: 10-3-00

s/ Charles R. Breyer
CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 00-0578 CRB

JUDGMENT

HUBER, HUNT & NICHOLS, INC.,

Plaintiff & Counterdefendant,

v.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY LOCAL 38,

Defendant & Counterclaimant.

No. C 00-2377 CRB

JUDGMENT

HUBER, HUNT & NICHOLS, INC.,

Plaintiff & Counterdefendant,

v.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY LOCAL 38,

Defendant & Counterclaimant.

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Pursuant to its Order Regarding Plaintiff's Motion and Defendant's Cross-Motion for Summary Judgment of October 3, 2000, the Court has granted in part and denied in part the plaintiff's motion for summary judgment and has granted in part and denied in part the defendant's cross-motion for summary judgment. It is hereby ORDERED that judgment be entered accordingly.

IT IS SO ORDERED.

Dated: 10-3-00

s/ Charles R. Breyer
CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

Supreme Court U.S.
FILED
JUL 3 2002
OFFICE OF THE CLERK

No. 01-1790

In The

Supreme Court of the United States

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY, LOCAL 38,

Petitioner,

v.

HUBER, HUNT & NICHOLS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Respondent does not agree with the characterization of the question presented for review offered by the Petitioner. In Respondent's view, the question presented is whether the Court of Appeals correctly determined that provisions of a project labor agreement, which supervened provisions of subordinate collective bargaining agreements, allocated to the project labor agreement arbitrator the authority to determine whether a claim made by one signatory union was a jurisdictional claim to be referred for resolution in accordance with the jurisdictional dispute resolution provisions of the project labor agreement.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Huber, Hunt & Nichols, Inc. (now The Hunt Corporation) opposes the issuance of a Writ of Certiorari to review the Opinion of the United States Court of Appeals for the Ninth Circuit in this proceeding.

I.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 282 F.3d 746 (9th Cir. 2002) and is reproduced in the Appendix to the Petition for Writ of Certiorari. The District Court's unpublished Judgment and Order Regarding Plaintiff's Motion and Defendant's Cross-Motion for Summary Judgment are available at 2000 U.S. Dist. LEXIS 15238 and 142 Lab. Cas. (CCH) ¶10,835 and are reproduced in Appendix B to the Petition for Writ of Certiorari.

II.

JURISDICTIONAL STATEMENT

On March 6, 2002, the United States Court of Appeals for the Ninth Circuit filed its opinion in this case on appeal from the Judgment and Order regarding Plaintiff's Motion and Defendant's Cross-Motion for Summary Judgment, both entered in the civil docket by the United States District Court for the Northern District of California on October 12, 2000. The parties agree that the Supreme Court of the United States has jurisdiction to review the opinion of the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 1254(1).

III

STATUTORY PROVISIONS

The relevant statutory provisions are Sections 8(e) and (f) of the National Labor Relations Act ("NLRA") (29 U.S.C. §§ 158(e), (f)). These provisions are set forth in the body of the Petition for Writ of Certiorari.

IV.

STATEMENT OF FACTS

The within action was brought by Huber, Hunt & Nichols, Inc. ("Huber") to confirm an arbitration award issued in its favor by Permanent Arbitrator Gerald McKay under the Project Stabilization Agreement ("PSA") for the Pacific Bell Ballpark Project in San Francisco and to vacate a conflicting arbitration award issued in favor of Defendant/Appellee United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry Local 38 ("Local 38") by the Arbitration Committee under Local 38's collective bargaining agreement.

Permanent Arbitrator McKay's arbitration award concluded that the underlying grievance filed by Local 38 constituted a jurisdictional dispute pursuant to Articles 5.2 and 6.4 of the PSA, which mandated the exclusive remedies for resolution of jurisdictional disputes. Arbitrator McKay did not address the merits of Local 38's jurisdictional claim.

The Local 38 Arbitration Committee, concluding that the underlying grievance constituted a breach of contract claim rather than a jurisdictional claim, issued a conflicting arbitration award under Local 38's collective bargaining agreement.

Huber is a general contractor which performed construction work on the Pacific Bell Ballpark Project. On or about January 18, 2000, Local 38 filed a grievance against Huber protesting the assignment of certain work by Huber's subcontractors to unions other than Local 38.

Huber, contending that the grievance constituted a jurisdictional dispute which must be resolved pursuant to the PSA, submitted the grievance to Arbitrator McKay, as designated under the PSA. Local 38, contending that the grievance constituted a breach of the exclusive hiring and subcontracting provisions in its collective bargaining agreement, submitted the grievance to the Arbitration Committee under Local 38's own collective bargaining agreement.

On February 16, 2000, Arbitrator McKay convened a hearing under the PSA and concluded that the grievance filed by Local 38 constituted a jurisdictional dispute. Local 38 refused to participate in the hearing. Arbitrator McKay issued his arbitration award, which directed the parties to resolve the jurisdictional dispute in accordance with the mandatory guidelines set forth in Article 5.2 of the PSA. (*See* Petitioner's Lodging, p. 6)

Following Arbitrator McKay's award, on February 23, 2000 the Arbitration Committee, convened under Local 38's collective bargaining agreement, contrarily concluded that the grievance did not constitute a jurisdictional dispute but a breach of Local 38's exclusive hiring and subcontracting provisions. The Arbitration Committee issued its conflicting arbitration award, granting Local 38 damages against Huber in the amount of $110,547.80.

On February 18, 2000, Huber filed its petition in the United States District Court, Northern District of California,

Case No. 00-0578, seeking to confirm the February 16, 2000 arbitration award issued in its favor by Arbitrator McKay under the Project Stabilization Agreement.

On or about March 6, 2000, Local 38 filed its Response to Huber's petition and a counterclaim for confirmation of the Local 38 arbitration decision.

On March 29, 2000, Huber filed an amended Application for confirmation of Petitioner's arbitration award and an application to vacate Respondent's arbitration award.

On April 21, 2000, Huber filed its answer to the counterclaim of Local 38 for confirmation of its arbitration award and request to vacate the arbitration award of Arbitrator McKay.

On April 21, 2000, Huber filed a motion for summary judgment contending, as a matter of law, that the District Court must not only confirm the arbitration award issued by Arbitrator McKay under the PSA, but vacate the arbitration award issued by the Arbitration Committee under Local 38's collective bargaining agreement, because the grievance filed by Local 38 constituted a jurisdictional dispute which required resolution under the procedures mandated by the PSA. Huber argued that Arbitrator McKay's determination that Local 38's claim was a jurisdictional dispute was a factual and legal finding which the trial court had no jurisdiction to disturb. Individual collective bargaining agreements of craft unions are subordinate to and subject to the supervening provisions of the PSA. (*See* discussion *infra*). Any conflict between Arbitrator McKay's findings under the PSA and a determination of the grievance panel of a single craft union must be resolved in favor of the PSA arbitrator's decision.

On or about April 20, 2000, Local 38 filed its countermotion for summary judgment seeking to vacate the arbitration award issued by Arbitrator McKay and to confirm the arbitration award issued by the Local 38 Arbitration Committee on the grounds that the underlying grievance constituted a breach of Local 38's exclusive hiring and subcontracting provisions rather than a jurisdictional dispute.

On October 5, 2000, the District Court issued its Order Regarding Plaintiff's Motion and Defendant's Cross-Motion For Summary Judgment ("Order").[1] In the Order, the District Court identified the issue before the Court in the cross-motions for summary judgment:

> The parties dispute whether the January 18 grievance was jurisdictional in nature. If the grievance was a jurisdictional dispute, then under section 6.4 of the PSA, the parties should have employed the PSA dispute resolution process. The PSA awards should therefore be confirmed and the committee award[2] should be vacated. On the other hand, if the grievance did not provoke a jurisdictional dispute, the parties were bound to use the CBA[3] arbitration procedures.

As the Ninth Circuit panel unanimously found, the District Court erroneously concluded that the grievance

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[1] The "Order" addressed a second award pertaining to "off-site" work which is not the subject of this proceeding.

[2] The "committee award" refers to the arbitration award issued by the Arbitration Committee under Local 38's collective bargaining agreement.

[3] The "CBA" refers to Local 38's collective bargaining agreement.

filed by Local 38 constituted a contractual claim rather than a jurisdictional claim. The District Court incorrectly vacated the arbitration award issued in favor of Huber under the PSA and confirmed the arbitration award issued in favor of Local 38 by the Arbitration Committee under Local 38's collective bargaining agreement. The trial court's decision was based primarily upon the NLRB's controversial 3-2 opinion in *Laborers International Union (Capitol Drilling Supplies)*, 318 NLRB No. 100 (1995) which overruled twenty years of Board law and held that the Board could not conduct a jurisdictional review under Section 10(k) of the National Labor Relations Act ("NLRA") where the union claiming work its members were not assigned merely grieves the alleged misassignment and seeks *only* monetary relief unaccompanied by any coercive conduct violative of Section 8(b)(4)(D) of the NLRA. (That issue, which is one of fact, is disputed in this case.)

But as noted by the Board in *Laborers Local 113 (Super Excavators)*, 327 NLRB No. 31, 159 LRRM 1281 (1998), "The Board (in *Capitol Drilling*) did not overrule prior cases insofar as they held that a 'pay-in-lieu' grievance may constitute a competing claim for work. *See Carpenters Los Angeles County Council (Swinerton & Walberg)* 298 NLRB 412, 414 (1990). *See also Local 30, United Slate, Tile & Composition Roofers v. NLRB*, 1 F.3d 1419, 1427 (3rd Cir. 1993) (attempted distinction 'between seeking the work and seeking pay for the work is ephemeral.') *Super Excavators*, n. 5." On appeal, the Ninth Circuit panel unanimously reversed, finding on its *de novo* review of the record that the PSA arbitrator's decision was entitled to deference and trumped any contrary findings

by self-interested panels of union and employer representatives of individual construction crafts.

V.

ARGUMENT

A. THE NINTH CIRCUIT CORRECTLY DECIDED THAT THE PROJECT LABOR AGREEMENT OVERRODE ANY CONFLICTING PROVISIONS IN THE UNDERLYING COLLECTIVE BARGAINING AGREEMENTS OF THE TRADE UNIONS

Petitioner's brief completely ignores the fact that this case does not involve a single collective bargaining agreement between a union and an employer; rather it involves a project labor agreement to which many labor unions and contractors and subcontractors are signatory. Such agreements are common in the construction industry; *see, e.g., Building and Construction Trades Council v. Associated Builders and Contractors of Massachusetts*, 113 S.Ct. 1190 (1993). Unfortunately, the shrinking union workforce in this country and the corresponding shrinking union membership often motivates unions to "cannibalize" the work of other trade craft unions. This case is an example of such activity. It must be noted that the arbitrator did not *rule against* the petitioner, but merely referred the claim to the jurisdictional resolution procedures which are available to the basic craft unions to resolve issues regarding entitlement to particular work assignments. By contrast, the Local 38 collective bargaining agreement grievance procedure, which is not concerned with the interests of any other trade craft unions, was a virtual "kangaroo court" which inevitably resulted in an award to Local 38, the only union in attendance at the hearing. The

only realistic choice the arbitrator had was to respect the all-craft project labor agreement and refer the jurisdictional claim to resolution pursuant to its provisions.

B. THIS CASE DOES NOT PRESENT A MAJOR INTER-CIRCUIT CONFLICT

In Part III of its petition, petitioner asserts that the decision in the referenced action creates a major inter-circuit conflict because it is contrary to decisions issued by the Seventh Circuit; *see Hunter Construction Co. v. International Union of Operating Engineers Local 139*, 862 F.2d 641 (1998), and *Miron Construction Co. v. International Union of Operating Engineers*, 44 F.3d 558 (1995).

In fact, these cases have nothing whatsoever to do with the issue involved in this case.

In *Hunter*, the employer was signatory to a *single collective bargaining agreement* (not a multi-craft project labor agreement) and the *only* issue was whether the subcontracting of work to a non-signatory was subject to bipartite arbitration under the contract or subject to tripartite arbitration as a "jurisdictional dispute." The court had little difficulty in determining that the grievance was properly submitted to bipartite arbitration as a violation of the collective bargaining agreement. There was no multi-craft project labor agreement and no conflict between the provisions of different agreements for the court to resolve.

In *Miron*, *supra*, the court was confronted with a claim for breach of the *same* area-wide contract, and, following *Hunter*, concluded that the matter was subject to bipartite arbitration. Again, there was no project labor agreement, no multiplicity of crafts claiming the work, and

no issue about whether a project labor agreement would preempt or trump countervailing provisions of the bargaining agreement being considered. The Seventh Circuit cases thus are factually inapposite from the present case and there is no issue conflict for this Court to resolve. *See also IUOE Local 103 v. Indiana Construction Corporation*, 13 F.3d 253 (7th Cir. 1994).

C. ARBITRATOR McKAY'S RULING TRUMPS THE CONTRARY FINDINGS OF THE LOCAL 38 GRIEVANCE COMMITTEE

Arbitrator McKay ruled: "Local 38's claim that the employer should force its subcontractors to reassign work to members of Local 38 is a jurisdictional claim arising under the provisions of the Project Stabilization Agreement.... It is not an individual claim under a Local Collective Bargaining Agreement.... UA Local 38 is not entitled under Article 6.4 (of the PSA) to have this jurisdictional claim heard as part of a grievance under its Local Collective Bargaining Agreement or to discuss the claim as a wage claim for the difference between what the workers who did the work were paid and what UA members are paid. *A jurisdictional claim is a jurisdictional claim no matter how it is dressed up.*" [Emphasis supplied] The trial court, contrary to the ultimate decision of the Ninth Circuit, elected to treat PSA Arbitrator McKay's ruling as if it were on an equal footing with the decision of the Local 38 grievance panel. But it was not; the PSA overrides conflicting provisions of individual craft bargaining agreements. (*See* PSA Sec. 2.2, Petitioner's Lodging, p. 2) It then treated Local 38's claim as if Huber Hunt & Nichols had filed an 8(b)(4)(D) charge with the NLRB seeking a 10(k) jurisdictional determination. But Huber did not and

could not. 10(k) relief before the NLRB under *Capitol Drilling* is only available when the union has engaged in coercive conduct to enforce its claim.

Local 38 was also party to the project-wide PSA, which contains its *own internal* mandates for resolving disputes. The NLRB's procedures were never involved. The *whole purpose* of a project-wide labor agreement is to assure speedy and final resolution of disputes, and avoid the expensive and time-consuming procedures of the NLRB and the courts. *See, generally, Building and Construction Trades Council, supra*, 113 S.Ct. 1190 (1993). The vice of the trial court's decision (and the vindication of the Ninth Circuit's decision) is the trial court's failure to take cognizance of Section 2.2 of the PSA, which provides that "Any provision of a Local Collective Bargaining Agreement contrary to the intent and meaning of this Agreement *shall not be enforced* as to the Contractor or Subcontractor working under the terms of this Agreement."

The January 18, 2000 grievance filed by Local 38 arose out of a jurisdictional dispute regarding the assignment of work by Huber's subcontractors to competing unions, namely, the Laborers, the Carpenters and the Sheet Metal Workers, which work Local 38 claimed fell within the recognized scope of work of Local 38's collective bargaining agreement. Subjecting such a claim to a "kangaroo court" hearing before the self-interested Local 38's own grievance committee "freezes out" the interests of the other crafts claiming the work. (It is undisputed that no other craft attended the Local 38 hearing.) This scarcely contributes to the overall project stability which the PSA was designed to protect.

D. THE PSA ARBITRATOR'S RULING ACCORDS WITH CASE LAW ON THE DEFINITION OF A JURISDICTIONAL DISPUTE

In *International Longshoremen's & Warehousemen's Union, Local 62-B v. National Labor Relations Board*, 781 F.2d 919, 923 (D.C. Cir. 1986), the Court held that the "essence of a jurisdictional dispute" is "the existence of a 'dispute between two or more groups of employees over which is entitled to do certain work for an employer.'" *Id.* at 924, citing *NLRB v. Radio Television Broadcasting Engineers Union, Local 1212*, 364 U.S. 573, 579, 81 S.Ct. 330, 5 L.Ed.2d 302 (1961).

In addition, the D.C. Circuit identified two defining characteristics of a jurisdictional dispute:

> First, the employer faces a jurisdictional dispute that is not of his own making and in which he has no interest; second, the dispute is between two employee groups. *International Longshoremen's & Warehousemen's Union, Local 62-B* at 781 F.2d at 924.

The D.C. Circuit stated that the NLRB will recognize a jurisdictional dispute even in cases where no dispute appears at first glance:

> . . . the [NLRB] has held that, where certain employees were doing work and another group of employees demanded that work, these [jurisdictional] provisions applied. Even though the first group of employees may not have explicitly claimed the work, the fact that they were *doing* the work was evidence of their claim. *Id.*, citing *International Union of Operating Engineers,*

> *Local 926*, 254 NLRB 994, 996 (1981).[4] [Emphasis supplied.]

See also International Longshoremen's and Warehousemen's Union, Local 14 v. National Labor Relations Board, 85 F.3d 646, 652 (D.C. Cir. 1996) (craft employees' performance of disputed work is evidence of their claim to the disputed work, even absent an explicit claim for that work.) The Court in *Local 14* further noted that just because the group of employees actually performing the disputed work did not voice a concern about keeping the disputed work, does not indicate that the employees would not protest if that work were actually taken away from them. *Id.* This is just common sense.

The Ninth Circuit recognizes a jurisdictional dispute as nothing more than a dispute between two or more unions, each of whom is claiming a right to perform the disputed work. *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local No. 342 v. Bechtel Construction*, 128 F.3d 1318, 1320 (9th Cir. 1997).

In the case at hand, on January 18, 2000, Local 38 filed a grievance against Huber alleging that certain of Huber's subcontractors assigned work to other unions which scope of work fell within the jurisdiction of Local 38.

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[4] In *International Longshoremen's & Warehousemen's Union, Local 62-B, supra*, the Court held that no jurisdictional dispute existed because the employer directly assigned the disputed work and further, the employer clearly had an interest in assigning the work to its own employees as opposed to a competing group. *Id.* at 925. In the case at hand, the jurisdictional dispute was not of Huber's making, as Huber did not assign the disputed work to its own employees and had no interest in which of the competing unions performed the work.

Citing to Article X, section 66, of its own collective bargaining agreement, Local 38 alleged that:

> The recognized **scope of work** of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada . . . is as follows (Emphasis added):
>
> (3) All cold, hot and circulating water lines, piping for house pumps, cellar drainers, ejectors, house tanks, pressure tanks, swimming pools, ornamental pools, display fountains, drinking fountains, aquariums, plumbing fixtures and appliances, and the handling and setting of the above-mentioned equipment;
>
> (8) All bathroom, toilet room and shower room accessories, i.e., as towel racks, paper holders, glass shelves, hooks, mirrors, cabinets, etc.; and
>
> (9) All lawn sprinkler work, including piping, fittings and lawn sprinkler heads.

The January 18, 2000 grievance demonstrates that a dispute existed between competing unions (in this case, Local 38, the Laborers, the Carpenters and the Sheet Metal Workers) as to which union was entitled to perform certain work. The fact that the Laborers, the Carpenters and the Sheet Metal Workers performed the disputed work at issue evidences their respective claims to the disputed work.

As noted above, the dispute was *not of Huber's making* as Huber neither assigned the disputed work to the three

competing unions[5] nor had any interest in which of the competing unions should perform the work.[6]

For the foregoing reasons, Arbitrator McKay's decision that the January 18, 2000, grievance constitutes a jurisdictional dispute conforms with case law is and was correct.

E. THE JURISDICTIONAL DISPUTE BETWEEN LOCAL 38 AND HUBER MUST BE RESOLVED PURSUANT TO THE PROJECT STABILIZATION AGREEMENT

It is well established law that "[a]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit". *Southern California District Council of Laborers v. Berry Construction*, 984 F.2d 340, 343 (9th Cir. 1993) *citing AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 648, 106 S.Ct. 1415, 1418, 89 L.Ed.2d 648 (1986).

As with any contract, "the parties' intentions control, but those intentions are generously construed as to issues of arbitrability". *Three Valleys Municipal Water District v. E.F. Hutton & Co., Inc.*, 925 F.2d 1136, 1139 (9th Cir. 1990).

In determining arbitrability, "[t]he judicial inquiry . . . must be strictly confined to the question whether the reluctant party did agree . . . to give the arbitrator power to make the award he made". *Meiswinkel v. Laborer's*

---

[5] *See International Longshoremen's & Warehousemen's Union, Local 62-B, supra*, at 781 F.2d at 924.

[6] *Id.*

Union Local 261, 744 F.2d 1374 (9th Cir. 1984), *citing United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347, 1353, 4 L.Ed.2d 1409 (1960).

In *Meiswinkel*, the Laborers filed a grievance under their collective bargaining agreement against Meiswinkel, the employer, alleging that Meiswinkel violated the collective bargaining agreement by assigning disputed cleanup work to the Carpenters, a competing union. *Meiswinkel* at 744 F.2d at 1375.

The Laborers' collective bargaining agreement provided, however, that the grievance and arbitration mechanism is invoked for "[a]ny dispute concerning the interpretation or application of this Agreement, *other than a jurisdictional dispute. . . .* " (Emphasis added). *Id.* at 1375-76. Nevertheless, an arbitration award was issued under the Laborers' collective bargaining agreement upholding the Laborers' claim of entitlement to the disputed work. *Id.* at 1376.

The Ninth Circuit held that the arbitration award was unenforceable because:

> "[i]t is clear from the uncontroverted facts in the record that the dispute was jurisdictional. The Carpenters' and Laborers' Unions both felt that they were entitled to perform the cleanup work. The employer was caught between rival demands." *Id.* at 1377.

The Court stated that "[t]he contractual language forbade the arbitrator to decide this dispute". *Id.* The Court summarized:

> Since '[t]he arbitrator's authority is circumscribed by the arbitration agreement, and he can

> bind the parties only on those issues that they have agreed to submit to him' [citation omitted], the district court did not err in its determination that the award is unenforceable.' *Id.*

In *New England Mechanical, Inc. v. Laborers Local Union 294*, 909 F.2d 1339 (9th Cir. 1990), the Ninth Circuit, relying on *Meiswinkel*, *supra*, held that it was implausible for the Board of Adjustment ("Board") under a Laborers' agreement to determine that the Laborers' collective bargaining agreement provided for resolution of a jurisdictional dispute where the collective bargaining agreement provided that the board could resolve "'[a]ny dispute regarding the interpretation or application of this Agreement, *other than a jurisdictional dispute*.'" (Emphasis added). *New England Mechanical* at 909 F.2d at 1345-46.

By contrast, in the case at hand, on July 21, 1997 the parties executed a Project Stabilization Agreement for the Pacific Bell Ballpark Project. The Project Stabilization Agreement provided as follows:

> This Agreement [is] made and entered into the 21st day of July, 1997 by and between Huber, Hunt & Nichols/Kajima, A Joint Venture of Huber, Hunt & Nichols Inc./Kajima Construction Services, Inc. (hereinafter referred to as Contractor), and Employers Advocate, Inc. (As Labor Relations Coordinator, hereinafter referred to as Coordinator), together with Subcontractors of whatever tier who shall become signatory to this Agreement in accordance with Appendix B (hereinafter referred to as Subcontractors), the San Francisco Building & Construction Trades Council, and the affiliated AFL-CIO Construction Unions signatory to this Agreement (hereinafter

> referred to as "Unions"). *The parties further agree that the provisions of this Agreement shall apply to construction work, under control of, and performed by the Contractor and Subcontractors on the Pacific Bell Ballpark Project.*
>
> (Emphasis added.)

The Unions that were signatory to the PSA included Local 38, the Laborers, the Carpenters and the Sheet Metal Workers.

The parties agreed to be bound to the dispute resolution procedures under the PSA.

Section 1.2 of the Project Stabilization Agreement states that:

> To maintain a spirit of harmony, labor-management relations peace, and stability during the term of this Agreement, the parties agree to establish effective and *binding* methods for the settlement of all misunderstandings, disputes or grievances which may arise by establishing binding grievance and arbitration procedures. (Emphasis added).

As discussed above, the Project Stabilization Agreement was intended by the parties to be controlling over any applicable collective bargaining agreement, including that of Local 38. **Section 2.2** of the Project Stabilization Agreement states that:

> Any provision of Local Collective Bargaining Agreements contrary to or conflicting with this Agreement or contrary to the intent and meaning of this Agreement *shall not be enforced* as to the Contractor or Subcontractor working under the terms of this Agreement. (Emphasis added)

To the extent that Local 38's collective bargaining agreement is contrary to or in conflict with the Project Stabilization Agreement, the collective bargaining agreement must not be enforced.

The Project Stabilization Agreement provides the *exclusive remedy* for Huber and Local 38 in the event of a jurisdictional dispute. **Section 5.2** of the Project Stabilization Agreement states that:

> Where a jurisdictional dispute exists, it shall be first referred for resolution to the Local Unions. If they are unable to resolve the dispute, the dispute shall then be referred for resolution to the International Union General Presidents. The resolution of the dispute shall be reduced to writing, signed by the authorized representative of the International Unions and Contractor or Subcontractors. The assignments made by the Contractor or Subcontractors shall be followed until such time as the dispute is resolved in accordance with this section.

Article 6 to the Project Stabilization Agreement states:

> **6.4** Any dispute, **excluding jurisdictional disputes (Article 5)**, concerning any application or interpretation of a Local Collective Bargaining Agreement shall be subject to the applicable grievance procedure of said Local Collective Bargaining Agreement. (Emphasis added).

But as demonstrated above, it is clear from the uncontroverted facts that the January 18, 2000 grievance filed by Local 38 was a classic, traditional jurisdictional claim of work sought by competing unions.

Because Article 6.4 to the Project Stabilization Agreement *expressly excluded jurisdictional disputes* from arbitration under Local 38's collective bargaining agreement, Huber and Local 38 did not agree to submit jurisdictional disputes to arbitration under Local 38's collective bargaining agreement. In fact, Article 6.4 to the Project Stabilization Agreement *forbids* the Local 38 Arbitration Committee to arbitrate the jurisdictional dispute under Local 38's collective bargaining agreement.

Because the Arbitration Committee's authority is circumscribed by Articles 5.2 and 6.4 of the Project Stabilization Agreement wherein the Local 38 Arbitration Committee can bind Huber and Local 38 only on those issues that they have agreed to submit to it, i.e., "[a]ny dispute, **excluding jurisdictional disputes (Article 5)** concerning any application or interpretation of a Local Collective Bargaining Agreement . . . ", the arbitration award issued in favor of Local 38 by the Arbitration Committee is void and unenforceable.

F. THE GRIEVANCE FILED BY LOCAL 38 DOES NOT CONSTITUTE A PURELY CONTRACTUAL DISPUTE BECAUSE THERE EXISTED COMPETING CLAIMS FOR THE DISPUTED WORK

In *Capitol Drilling*, *supra*, a 3-2 majority of the NLRB held that a jurisdictional dispute will be recognized under Section 10(k) of the NLRA where a competing union not only pursues a contractual claim against an employer for breach of a collective bargaining agreement's exclusive hiring provisions, but makes a coercive claim for the disputed work.

But in a later decision, *Laborers' International Union of North America, Local No. 113 (Super Excavators)*, 327 NLRB 31, 159 LRRM 1281 (1998), the Board limited *Capitol Drilling*. The Operating Engineers, which sought work performed by the Laborers, claimed that the dispute at issue was not a jurisdictional dispute because "it has expressly disclaimed any interest in reassignment of the work in dispute; it merely filed a grievance requesting pay-in-lieu of work". *Id.* at 159 LRRM at 1282.

The NLRB disagreed, finding that the Operating Engineers' claim constituted a competing claim for the disputed work and thus a jurisdictional dispute. The NLRB stated that: (1) the Laborers, a competing union, had at all times claimed the work in dispute; and (2) the Operating Engineers sought reassignment of the disputed work. *Id.*

Similarly, in *Plasterers and Cement Masons, Local 502 (PMB Concrete, Inc.)*, 328 NLRB 84, 161 LRRM 1211 (1999), the NLRB rejected the Cement Masons' assertion that no jurisdictional dispute existed because there were no competing claims for the disputed work and further, the union did not engage in any proscribed, coercive activity. In support of its finding that the underlying dispute *was* a jurisdictional dispute, the NLRB stated that the conduct by the Cement Masons in approaching the subcontractor at issue (the employer) and stating that the work at issue was the Cement Masons', constituted a clear and direct claim to the employer for the disputed work, and was therefore jurisdictional in nature. *Id.* at 161 LRRM at 1213.

In the case at hand, Arbitrator McKay found that there existed competing claims over the disputed work. In support of his finding, Arbitrator McKay concluded that:

> Representatives of the Carpenters, the Sheet Metal Workers and the Laborers appeared at the arbitration and claimed the work assignments were done properly. All of the work in question, according to the three crafts who appeared, belong within their jurisdictional authority.

Arbitrator McKay further found that Local 38 made a *claim* for the disputed work. In support of his finding, Arbitrator McKay found that:

> Mr. Larry Mazzola, executive officer for UA Local 38, *made a demand* on Ray Zunino, the construction manager for the Employer, that certain work which is presently being performed by workers of other craft unions be reassigned to workers who are members of UA Local 38. [Emphasis supplied.]

The two-pronged test set forth in *Super Excavators* has been met in this case and Local 38's grievance constituted a true jurisdictional dispute because: (1) Local 38, the Carpenters, the Laborers and the Sheet Metal Workers had competing claims for the disputed work at issue; and (2) Local 38 not only pursued its contractual remedies against Huber, but also made a claim directly to Huber for the disputed work.

VI.

CONCLUSION

The unanimous decision of the Ninth Circuit panel was correct and should not be disturbed. It is consistent

with the case law of this Court and of the Ninth Circuit itself. For the reasons set forth herein, this Court should deny the petition for writ of certiorari.

Dated: July 2, 2002

Respectfully submitted,

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(3)

Supreme Court, U.S.
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No. 01-1790

IN THE

Supreme Court of the United States

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY, LOCAL 38,

Petitioner,

v.

HUBER, HUNT & NICHOLS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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This brief constitutes Petitioner United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 38's ("Local 38") reply to Respondent Huber, Hunt & Nichols, Inc.'s ("Huber") Brief in Opposition to Petition for Writ of Certiorari (the "Opposition Brief"). Local 38 filed its Petition for Writ of Certiorari (the "Petition") on June 4, 2002 to review the Opinion of the United States Court of Appeals for the Ninth Circuit in this proceeding.

I.

ARGUMENT

A. HUBER'S OPPOSITION BRIEF FAILS TO ADDRESS OR REBUT THE ARGUMENTS MADE IN SUPPORT OF LOCAL 38's PETITION.

Local 38's Petition presented the following question for review:

> Whether the parties to a project labor agreement gave the arbitrator the authority to determine whether he can resolve disputes over arbitrability or whether that issue is properly left for judicial determination.

The Petition states that this Court should grant Local 38's petition for the following reasons:

- The Ninth Circuit's holding that the Project Stabilization Agreement's ("PSA") "broad arbitration clause" gave the PSA Arbitrator authority to determine the threshold question of arbitrability directly conflicts with this Court's holdings in *AT&T*

Technologies, Inc. v. Communications Workers, 475 U.S. 643 (1986), and prior precedent. The *AT&T Technologies* Court concluded that an arbitration clause similar to that in the present case required the court, rather than the arbitrator, to decide arbitrability. *Id.* at 651.

- The Ninth Circuit's holding here that the arbitrator, not the court, decides arbitrability conflicts with the decisions of other Circuit Courts of Appeals which have considered cases in which the question was whether the nature of the dispute was jurisdictional or contractual.

- The Petition presents a question of national importance because the Ninth Circuit's decision destabilizes the balance between arbitrability and review of arbitration awards.

Rather than squarely addressing any of these arguments, Huber's Opposition Brief obfuscates the Question Presented for Review by more than doubling its length and rehashes the arguments it made before the Ninth Circuit without responding to the arguments offered for the Court to grant the Petition. Boiled down, Huber's version of the Question Presented is as follows:

> [W]hether the Court of Appeals correctly determined that provisions of a project labor agreement . . . allocated to the project labor agreement arbitrator the authority to determine whether a claim . . . was a jurisdictional claim . . .

Using different words, Huber and Local 38 present the Court with essentially the same question: did the PSA "clearly and

unmistakably" grant the PSA Arbitrator authority to determine his own jurisdiction? *AT&T Technologies*, 475 U.S. at 649. Unfortunately, Huber declines to address this question in its Opposition Brief.

Instead, Huber focuses almost exclusively on whether the underlying dispute was a "jurisdictional dispute" to be handled under the PSA's procedures or a subcontracting dispute to be resolved under the incorporated collective bargaining agreement between Local 38 and Huber (the "CBA"). Huber presents various NLRB and Circuit Court cases in support of its argument that the underlying dispute was jurisdictional. However, whether Local 38's grievance was a "jurisdictional dispute" is irrelevant both to the Ninth Circuit's decision and to the arguments which support granting the Petition, because the Ninth Circuit expressly "decline[d] to label the underlying dispute here as either a jurisdictional or a contractual dispute." Petition, App. A, p. 8a. Instead, the Ninth Circuit "examine[d] whether the overall dispute is *arbitrable*." [Emphasis added.] *Id.* Because the Ninth Circuit's opinion addresses the question of arbitrability rather than the nature of the underlying dispute, Huber's arguments concerning the nature of the dispute are irrelevant to the merits of Local 38's Petition.[1]

---

1. It is worth noting here that the District Court, the only forum benefitting from the full participation and briefing of both parties regarding whether the underlying dispute was jurisdictional or contractual, concluded that Local 38's grievance was *not* a jurisdictional dispute. See Petition, App. B.

B. HUBER'S ASSERTIONS OF FACT AND LAW FAIL TO UNDERMINE THE ARGUMENTS IN SUPPORT OF LOCAL 38's PETITION.

Huber's Opposition Brief seeks to undermine the Petition by mischaracterizing or misstating the facts of the case and the substantive law. The most significant factual error appears in the Opposition Brief's Statement of Facts. Huber asserts, "As the Ninth Circuit unanimously found, the District Court erroneously concluded that the grievance filed by Local 38 constituted a contractual claim rather than a jurisdictional claim." Opp. Brief, p. 5-6.

The Ninth Circuit actually concluded that the District Court's arbitrability inquiry contained the "fundamental fallacy" that it, rather than the arbitrator, should decide whether or not the work assignment dispute is a "jurisdictional dispute." Petition, App. A, p. 7a. It did *not* conclude that the District Court decided (erroneously or otherwise) whether the underlying dispute was "contractual" rather than "jurisdictional." Instead, the Ninth Circuit faulted the District Court for failing to inquire whether the PSA Arbitrator had "the power to decide the arbitrability question himself." *Id.* Misreading the decision as it does, Huber fails to address the reasons supporting Local 38's Petition.

Huber's utterly unsubstantiated assertions that the Local 38 Arbitration Committee is a "kangaroo court" (Opp. Brief, pp. 7, 10) are also irrelevant to the Court's consideration of the Petition. Huber made a voluntary decision to be bound by the terms of the CBA, including its grievance procedure and arbitration committee: under the express terms of Section 6.4 of the PSA, Huber agreed to submit any dispute, except jurisdictional disputes, concerning application or

interpretation of the CBA to the CBA's grievance procedure. Because it entered into these obligations voluntarily, Huber is not entitled to escape its commitments by deciding, when convenient, that it does not like the procedures to which it has contractually agreed.

Another significant mischaracterization contained in the Opposition Brief is that the "*whole purpose* of a project-wide labor agreement is to assure speedy and final resolution of disputes, and avoid the expensive and time-consuming procedures of the NLRB and the courts." [Emphasis in original.] Opp. Brief, p. 10. While speedy and final resolution of certain disputes is an important benefit gained through a project labor agreement, it is hardly the *only* reason for such agreements. By its terms the PSA offers numerous other benefits to the adopting parties including Union Security, No Strike-No Lockout, Joint Labor-Management Meetings, and Affirmative Action as Required by Local Law provisions. See Lodging Ex. 1; Petition, p. 5. Further, this Court has recognized the additional benefits to be obtained by entering into a project labor agreement, including cost certainty for contractors and a reliable supply of readily available skilled craftsmen. *Building & Constr. Trades Council v. Associated Builders & Contractors (Boston Harbor)*, 507 U.S. 218, 231 (1993); *Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 266 (1983).[2]

2. Huber also cites cases which do not support the propositions for which they are asserted. For example, the Opposition Brief states, "the dispute was *not of Huber's making* as Huber neither assigned the disputed work to the three competing unions nor had any interest in which of the competing unions should perform the work," [Emphasis in original.] Opp. Brief, pp. 13-14, citing *ILWU, Local 62-B v. NLRB*, 781 F.2d 919, 924 (D.C. Cir. 1986) as support for this proposition. However, the cited case does not stand for the proposition that a dispute will be considered "not of the employer's making" if (Cont'd)

C. HUBER FAILS TO MEND THE SPLIT BETWEEN THE SEVENTH AND THE NINTH CIRCUITS REGARDING WHETHER A COURT OR AN ARBITRATOR DECIDES IF A DISPUTE IS JURISDICTIONAL OR CONTRACTUAL.

Huber claims that the Seventh Circuit's *Hutter* and *Miron* decisions cited in Local 38's Petition are "factually inapposite from the present case" and "have nothing whatsoever to do with the issue involved in this case." Opp. Brief, pp. 9, 8. While neither case involved a project labor agreement, both cases nevertheless stand for the proposition that when the parties disagree whether the underlying dispute is jurisdictional or contractual, the nature of the underlying dispute is an issue for judicial, rather than arbitral, determination. *Hutter Constr. Co. v. Operating Engineers*, 862 F.2d 641, 644 (7th Cir. 1988); *Miron Constr. Co. v. Operating Engineers*, 44 F.3d 558, 562 (7th Cir. 1995).

(Cont'd)

the employer neither directly assigned the work in question nor cared who performed the work. In fact, Local 38's grievance was very clearly of Huber's making because Huber voluntarily elected to subcontract Local 38's work under the CBA to a nonsignatory subcontractor in violation of Article I, § 3(b) and Article II, § 12 of the CBA. Lodging Ex. 2, pp. L-34, L-40; *see also* PSA § 3.1, Lodging Ex. 1, p. L-7. *See also Hutter*, 862 F.2d at 645, n.15,

> In its brief, Hutter argues that it had no control over the circumstances that caused the breach. We find no merit to this contention. The "circumstances" that created the breach was Hutter's decision to subcontract the masonry work to BDI, not BDI's assignment to the Laborers, as Hutter claims. Hutter had complete control over the decision to subcontract the work to BDI.

As such, *Hutter* and *Miron* directly conflict with the Ninth Circuit's approach to the determination of arbitrability here.[3]

D. THE REST OF HUBER'S OPPOSITION BRIEF IS NON-RESPONSIVE TO THE ARGUMENTS PRESENTED IN LOCAL 38's PETITION.

The remainder of the Opposition Brief is a long repetition of the arguments Huber made in its final brief presented to the Ninth Circuit. Specifically, Huber restates the PSA Arbitrator's decision, argues that the PSA Arbitrator's decision accords with several cases decided by the D.C. Circuit and the Ninth Circuit regarding the definition of a "jurisdictional dispute," elaborates on the PSA's procedures for resolving jurisdictional disputes, and argues NLRB case law for the proposition that the underlying dispute here was jurisdictional. None of these arguments regarding the nature of the underlying dispute in any way vitiate the reasons presented by Local 38 for the Court to grant its Petition. Therefore, Local 38 concludes that a point-by-point refutation of Huber's arguments is unnecessary.[4]

---

3. Huber also makes much of the fact that the employer in *Hutter* was signatory to only a "*single collective bargaining agreement.*" [Emphasis in original.] Opp. Brief, p. 8. This statement is simply incorrect; in fact, both *Hutter* and *Miron* involve circumstances where the employer had entered into conflicting collective bargaining agreements with two different unions. *See Hutter*, 862 F.2d at 642, n.2 ("Hutter was also a party to a similar collective bargaining agreement with the Laborers. The practice of entering into conflicting collective bargaining agreements is very common in the construction industry."); *Miron*, 44 F.3d at 560-561.

4. While, as noted above, Huber's repetition of its arguments to the Ninth Circuit are non-responsive to the issues raised in the (Cont'd)

Instead, Huber's emphasis on the fact that the underlying dispute arose in circumstances where the parties had entered into both a project labor agreement and a collective bargaining agreement reinforces the importance of the issues presented in the Petition. Because the Court has not previously considered the interrelationship between the grievance procedures of a project labor agreement and a collective bargaining agreement when a dispute arises and because project labor agreements are used on large construction projects throughout the county, the Petition presents the Court with both a question of first impression and a question of national importance.

(Cont'd)
Petition, the Opposition Brief contains a very misleading discussion of the controlling NLRB authority. Huber mischaracterizes *Capitol Drilling Supplies*, 318 NLRB 809 (1995), as a "controversial 3-2 opinion" "which overruled twenty years of Board law." Opp. Brief, p. 6. In fact, the Board has long recognized that subcontracting disputes are analytically distinct from jurisdictional disputes. *See Carpenters Local 33 (AGC of Massachusetts)*, 289 NLRB 1482 (1988) (held that Board's decision to award work performed by subcontractor to one union in § 10(k) jurisdictional dispute hearing did not preclude the losing union from pursuing its contractual remedies via arbitration against the general contractor).

CONCLUSION

For reasons stated in the Petition and in this Reply Brief, Local 38's Petition for Writ of Certiorari should be granted.

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